NO. 84-5372

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROY E. DANIELS,
Petitioner,

vs.

ANDREW WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that a state may constitutionally deny a prison inmate any remedy for physical injuries suffered as a result of the negligence of a state prison employee, regardless of the seriousness of the injuries suffered, and in holding that a prisoner has a constitutionally protected interest only in his tangible property, not in his body?

2. Did the court of appeals err in holding that, even were it to find that a prisoner has a constitutionally protected interest in his body, this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), extends to liberty as well as property interests and bars a suit under 42 U.S.C. § 1983 for damages by a prisoner alleging injuries as a result of the negligence of a state prison employee as long as a state remedy exists?

3. Did the court of appeals err in holding that a meaningful state remedy, as required by this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), was available to a state prisoner who alleged personal injuries resulting from the negligence of a state prison employee where the prisoner sued the employee in state court as well as federal court, the employee relied on a defense of sovereign immunity, the employee declined to abandon that defense before the en banc court of appeals, and the court of appeals could not guarantee that sovereign immunity would not, in fact, bar the prisoner's recovery in state court?

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NO. 84-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROY E. DANIELS,
Petitioner,

vs.

ANDREW WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the en banc United States Court of Appeals for the Fourth Circuit is not yet reported, but it is contained in Appendix I to this petition. The panel opinion of the court of appeals is reported at 720 F.2d 792 (4th Cir. 1983), and is contained in Appendix II. The order of the United States District Court for the Eastern District of Virginia, granting summary judgment against Petitioner, is unreported, but is contained in Appendix III.

JURISDICTION

Judgment in the court of appeals was entered on November 16, 1984. Jurisdiction in this Court is grounded in 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 1983:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The facts of this case are simple. Roy Daniels, Petitioner, was a prisoner in the Richmond city jail on January 23, 1982. He claims that on that day he slipped and fell on a pillow and newspapers negligently left by the Respondent on stairs which Daniels used. Petitioner brought an action against Respondent in state court in which Respondent alleged sovereign immunity as a defense, and Petitioner also filed a civil rights suit in federal district court in which Respondent reiterated his defense of sovereign immunity.

Petitioner alleged in his suits that he injured his back and his ankle when he fell and that the injuries were caused by Respondent's negligence. The lower courts found that Petitioner could not proceed with his federal action, even assuming that he could prove what he alleged.

The United States District Court for the Eastern District of Virginia held that this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), barred a federal action, since Petitioner could proceed with his negligence claim in state court. (App. III). A panel of the United States Court of Appeals for the Fourth Circuit agreed, but the court of appeals granted a rehearing en banc. Following reargument, a majority of the panel reaffirmed the conclusion that Petitioner could not proceed with this federal action, but the majority reached its result through a very different analysis than the one used by the district court and the panel.

The majority of the court of appeals decided three separate issues against Petitioner: First, a 5-4 majority found that the Commonwealth of Virginia would not violate Petitioner's Fourteenth Amendment rights if it denied him an opportunity to seek a meaningful remedy against a state officer whose negligence resulted in injuries, even serious ones, to Petitioner's body. This majority reasoned that an injury to a prisoner's person, no matter how serious, does not require the meaningful post-

deprivation remedy that this Court found necessary following a $23.50 negligence-based property loss in Parratt v. Taylor. Second, the en banc court unanimously agreed that, even if a prisoner is entitled to some remedy for personal injuries attributable to the negligence of state officials, Parratt v. Taylor would apply to deprivations of liberty in the same way it applies to deprivations of property. Thus, Parratt v. Taylor would bar Petitioner's claim if he had a meaningful post-deprivation remedy in state court. Third, a 6-3 majority of the en banc court held that Petitioner had a meaningful remedy in state court, despite the fact that Respondent, who was represented on the brief in the court of appeals by the Attorney General of Virginia, had asserted in both state and federal court that sovereign immunity would prevent any recovery by Petitioner against Respondent and counsel for Respondent explicitly declined during oral argument before the en banc court to concede that Petitioner could overcome a sovereign immunity defense in state court.

I. THE HOLDING OF A 5-4 MAJORITY OF THE EN BANC COURT OF APPEALS THAT A STATE PRISONER HAS NO CONSTITUTIONALLY PROTECTED INTEREST IN HIS BODY AND THAT THE CONSTITUTION PROTECTS HIM ONLY FROM INJURY TO TANGIBLE PROPERTY IS INCONSISTENT WITH THE ASSUMPTIONS MADE IN EACH OF THE OPINIONS OF THE JUSTICES IN PARRATT V. TAYLOR AND IS IN CONFLICT WITH EVERY OTHER COURT OF APPEALS.

The holding by the majority overturned the holding of the panel that "[b]odily injury resulting from a state official's negligence . . . deprives a person of a liberty interest protected by the fourteenth amendment." (App. II at 2). As Judge Phillips explained in his dissent, which was joined by three other members of the court below:

> I simply cannot accept the majority's apparent holding that somehow the fourteenth amendment imposes a more stringent duty upon the states to avoid deprivations of the property than the liberty interests of either their prison inmates or citizens in their free societies. If there is a constitutional scale of values associated with the two kinds of interests, the majority's analysis seems to me to stand on its head the obvious rank order that would be assigned them. (App. I at 15-16)

Judge Phillips relied upon the several opinions issued by the Justices of this Court in Parratt v. Taylor:

> I do not believe that the critical principles that emerged from Parratt can be read as being narrowly confined to property interests. It is true that the case was about a property interest so that the specific holding is so limited, but the threshold issue identified and addressed in the majority opinion was "whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532. And this issue was answered affirmatively ....
>
> All of the other Justices writing in the case assumed that a necessary implication of the majority's holding on this point was that it applied to liberty as well as property interests. (App. I at 13).

Not only does the holding of the majority below conflict with this Court's own opinion in Parratt v. Taylor, but it also conflicts with every other holding on the point. See, e.g., Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984) (bodily injuries received due to state trooper's negligence are liberty deprivations); Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) (injuries suffered by pretrial detainee due to city officials' negligence are liberty deprivations); Brandon v. Allen, 719 F.2d 151 (6th Cir. 1983) (damages for injuries

received due to po_ se director's negligence i_ preventing an assault are not recoverable due to qualified immunity), cert. granted sub nom., Brandon v. Holt, 104 S. Ct. 2384 (1984); Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983) (extended prison term due to official's negligence in calculating sentence is a liberty deprivation); Holmes v. Ward, 566 F. Supp. 863 (E.D.N.Y. 1983) (injuries received after prison officers negligently failed to separate inmates represents a liberty deprivation); Junker v. Tinney, 549 F. Supp. 574 (D. Md. 1982) (burns received by inmate due to prison officials' negligence are liberty deprivations).

There is a division of authority as to whether liberty deprivations deny due process if a post-deprivation state remedy exists, which is discussed in connection with the second reason why Petitioner asks that his petition be granted. But there is no authority to support the position of the en banc majority that the Constitution affords no protection for injuries to the person of a prisoner who is under the custody, control and protection of state officers.

The only lower court case which has found that a nonproperty deprivation alleged to have resulted from the negligence of state officials did not amount to a liberty interest within the potential scope of § 1983 (depending on whether a meaningful post-deprivation remedy exists in state court) is Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), cert. denied, 104 S. Ct. 1325 (1984). This case is plainly distinguishable from the en banc court's holding below. In Jackson, the court held that a death that occurred after state officials negligently assisted a rescue is not a constitutional deprivation. 715 F.2d at 1206. The court stressed that the victim's own actions, wrecking her car, cause the harm, not the officials' failure to rescue. Id. at 1204. It reasoned that only "negative" liberty deprivations--the right to be left alone--as opposed to "positive" liberty deprivations--the right to receive protective services--are protected by the due process clause. Id. at 1203-04. Justices

White and Rehnquist dissented from the denial of the petition for certiorari. 104 S. Ct. 1325.

Assuming that Jackson is correct, it too supports the dissent in the instant case. Jackson plainly indicates that negligent infliction of injuries by state officials invades liberty interests.

Thus, the fourth circuit stands alone in its view of liberty interests. The majority opinion is inconsistent with every opinion in Parratt v. Taylor and is in conflict with all other lower courts. Petitioner asks this Court to grant his petition to reaffirm that liberty interests are no less valuable than property interests and that deprivations of liberty without due process violate the Fourteenth Amendment.

II. THE COURT OF APPEALS' UNANIMOUS HOLDING THAT, EVEN IF LIBERTY DEPRIVATIONS RECEIVE CONSTITUTIONAL PROTECTION, PARRATT V. TAYLOR EXTENDS EQUALLY TO LIBERTY AND PROPERTY INTERESTS AND BARS A SUIT UNDER § 1983 WHERE A STATE AFFORDS AN INJURED PRISONER A MEANINGFUL STATE COURT REMEDY EXACERBATES THE CONFUSION AMONG THE CIRCUITS AS TO THE SCOPE OF PARRATT.

This Court did not have occasion in Parratt v. Taylor to decide whether a suit brought under § 1983 for negligent deprivations of liberty interests may be maintained notwithstanding the availability of a meaningful state court remedy. Justice Blackmun's opinion, joined by Justice White, suggested that the majority opinion did not apply to deprivations of liberty or life. 451 U.S. at 545 (Blackmun, J., concurring). But other members of the Court expressed no opinion on the question.

The decision of the en banc court of appeals in the instant case exacerbates the confusion and division among the circuits. Indeed, it is fair to say that in some circuits there are internal divisions that produce inconsistent results.

Some circuits hold that liberty deprivations attributable to alleged misconduct on the part of state officers give rise to § 1983 actions only if a state fails to provide a meaningful remedy by way of a post-deprivation hearing. See, e.g.,

Thibodeaux v. Bordelon, 740 F.2d 329, 336 (5th Cir. 1984) (Parratt applies to negligent deprivations of liberty); Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) ("finding [a liberty] deprivation, the court must then determine whether the state procedures available for challenging the deprivation satisfy the requirements of due process"); Gilmere v. City of Atlanta, 737 F.2d 894, 905 (11th Cir. 1984) (court must decide if state's tort remedies satisfy procedural due process requirements); Haygood v. Younger, 718 F.2d 1472, 1480 (9th Cir. 1983) (distinction between liberty and property is unimportant), rehearing en banc granted, 729 F.2d 613 (1984); Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) ("Parratt . . . provides the guidance [for liberty deprivations] we must accept"), aff'd on other grounds sub nom., Kush v. Rutledge, 103 S. Ct. 1483 (1983).

Other circuits have refused to extend Parratt v. Taylor to some or all liberty deprivations. See, e.g., Wilson v. Beebe, 743 F.2d 342 348 (6th Cir. 1984) ("Parratt has no application where a negligent deprivation of life or liberty has been alleged"); Vail v. Board of Education, 706 F.2d 1435, 1441 (7th Cir. 1983) (Parratt does not control for intentional deprivations of liberty and property), cert. denied, 104 S. Ct. 2144 (1984); Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1982) ("[W]e decline to give Parratt the sweeping interpretation required to encompass the intentional deprivation of liberty involved in this case"); Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981) (Parratt does not apply to liberty interests), rev'd on other grounds, 461 U.S. 238 (1983).

The division in the circuits has caused district courts to differ on the proper treatment of claims that liberty interests have been damaged by negligent action on the part of state officers. Compare, e.g., Holmes v. Ward, 566 F. Supp. 863, 865 (E.D.N.Y. 1983) (Parratt not "per se inapplicable" to liberty claims) and Meshkov v. Abington Township, 517 F. Supp. 1280, 1286 (E.D. Pa. 1981) (plaintiff can seek remedy in state court) with Spallone v. Village of Roselle, 584 F. Supp. 1387, 1394 (N.D.

Ill. 1984) (intentional deprivations of liberty are actionable in federal court); Sager v. City of Woodland Park, 543 F. Supp. 282, 293 (D. Colo. 1982) (intentional and grossly negligent conduct that deprives life and liberty are actionable in federal court); and Howse v. DeBerry Correctional Institute, 537 F. Supp. 1177, 1180 (M. D. Tenn. 1982) (Parratt does not extend beyond negligent deprivations of property interests).

As Justice Rehnquist and Justice White observed in the dissent from the denial of certiorari in Jackson v. City of Joliet, 104 S. Ct. 1325 (1984), "[t]he inconsistent results below are attributable, at least in part, to the lack of definitive guidelines for determining when tortious conduct by state officials rises to the level of a constitutional tort." Petitioner urges this Court to grant review in the instant case to remove the uncertainty as to the application of Parratt v. Taylor to deprivations of liberty interests.

III. THE MAJORITY'S DECISION TO AFFIRM THE DISMISSAL OF PETITIONER'S COMPLAINT--DESPITE RESPONDENT'S ASSERTION IN BOTH STATE AND FEDERAL COURT THAT SOVEREIGN IMMUNITY BARRED ANY STATE COURT RECOVERY AND THE FACT THAT THE ATTORNEY GENERAL OF VIRGINIA SUPPORTED THIS ASSERTION IN THE BRIEF BEFORE THE EN BANC COURT OF APPEALS--IS INCONSISTENT WITH THIS COURT'S APPROACH IN HUDSON v. PALMER, 104 S. CT. 3194, THREATENS TO BURDEN STATE AND FEDERAL COURTS WITH MULTIPLE LITIGATION OF THE SAME CASE, AND THREATENS TO MAKE THE CONCEPT OF A MEANINGFUL STATE REMEDY DEVELOPED BY THIS COURT IN PARRATT v. TAYLOR AN EMPTY CONCEPT.

Although the 6-3 majority that concluded that Virginia state courts offered a meaningful state remedy to Petitioner expressed a belief that Respondent's alleged acts were outside the scope of sovereign immunity, the majority could find no case in point. Moreover, the highest ranking legal official in the Commonwealth of Virginia, who appeared on behalf of Respondent on the brief apparently holds a different view. When asked whether Respondent would concede that sovereign immunity would not bar a state court recovery by Petitioner, Respondent's counsel told the en banc court that Respondent would not yield the sovereign immunity claim (App. IV at 10 n.1).

The en banc court heard argument in two other cases at the same time it heard Petitioner's case. The other cases, Ausley v. Mitchell and Poole v. Morris were decided together on the same day as Petitioner's case. The court's opinion is contained in Appendix IV. The authorities cited to the court of appeals by the Petitioner and the plaintiffs in the two other cases convinced three judges of the en banc court that sovereign immunity might well bar Petitioner's state court action. Writing an opinion concurring in part in the Ausley and Poole decision (App. IV at 12-13), Chief Judge Winter observed that the Virginia Supreme Court's opinion in Bowers v. Commonwealth, 225 Va. 245, 302 S.E.2d 511 (1983), appears to hold that even ministerial acts can be subject to a sovereign immuni*y defense. In Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983), the Virginia Supreme Court took the view that sovereign immunity may bar equitable actions as well as actions for damages.

With these cases raising concern, Judge Phillips' dissenting opinion, on behalf of himself and two other judges in Petitioner's case, argued that it was certainly impossible to say that Petitioner could find a remedy in state court even if he proved negligence. Judge Winter's opinion in the related cases read Parratt v. Taylor to require "the Commonwealth to offer proof demonstrating the availability and the complete efficacy of any postdeprivation remedy relied on to invoke the rule of Parratt." (App. IV at 11 n.2) This is the approach Judge Phillips took in his dissenting opinion in Petitioner's case.

In response to the dissenters' concern about the emptiness of the theoretical state remedy, the majority cited two cases decided in 1808 and 1826 by the Virginia Supreme Court and dictum in one other case. (App. I at 9 n.5). The majority failed to observe that the Attorney General of Virginia supported the assertion of the sovereign immunity defense.

Were the assumption by the majority correct--i.e., that Petitioner could defeat a sovereign immunity claim in state court--Petitioner probably would have been able to pursue his

state court action to a conclusion, and the results of that action would have had res judicata effects that would bar any federal claim, even if Parratt v. Taylor is held to apply to liberty actions. The fact is, however, that it was the Commonwealth and the Respondent who raised sovereign immunity as a bar and who made the federal action necessary.

The effect of the court of appeals' decision is to leave Petitioner very probably without a remedy. His federal suit is barred, and his state remedy, according to the Respondent and his counsel, the Attorney General, also is barred. Thus, the majority below found a meaningful remedy where none exists.

This back-of-the-hand approach to state remedies departs dramatically from this Court's analysis in Hudson v. Palmer, 104 S. Ct. 3194 (1984). When this Court reaffirmed Parratt v. Taylor and extended it to intentional deprivations of property, the Court reiterated the requirement that a state must meet to satisfy the due process clause: it must provide a "meaningful postdeprivation remedy for the loss." Id. at 3204. This Court carefully examined Virginia law and concluded that a suit for intentional deprivation of property would lie. Id. at 3197 n.1 & 3205. This Court did what the majority of the court of appeals declined to do. As a result of the court of appeals' failure to insure that a state remedy exists for Petitioner, it left him very possibly cut off from all relief. In Parratt v. Taylor, 451 U.S. at 551 n.3 (Powell, J., concurring in the result), Justice Powell suggested that such a result would be inconsistent with the holding in Parratt. Hudson v. Palmer confirmed Justice Powell's suggestion. But a majority of the court of appeals departed from this Court's required analysis.

The court of appeals decision is inconsistent not only with this Court's opinions, but also with decision of other lower courts. Other courts have found that § 1983 claims must not be dismissed when sovereign immunity defenses in state courts would bar relief. See, e.g., Harper v. Scott, 577 F. Supp. 15 (E.D.

Mich. 1984); Junker v. Tinney, 549 F. Supp. 574, 579 (D. Md. 1982).

The damage to be expected from the decision below is considerable. This Court can see from the fact that in Petitioner's case, and in the two other cases argued below with his, the Commonwealth of Virginia takes a very broad view of sovereign immunity. The principal hope that a state prisoner had of persuading a state court to narrow the scope of sovereign immunity in order to give relief to injured prisoners, prior to the decision below against Petitioner, was reliance on § 1983 as an alternative remedy. State courts believed that if relief was barred in state courts, a federal suit could be brought. This belief might well have induced some state courts to give injured prisoners a remedy.

Following the decision against Petitioner, which holds that no remedy is required for negligent deprivations of liberty (which is discussed above), state courts now know that the court of appeals has held that a prisoner whose negligence claim might be sound can be denied a remedy in state court and the doors of the federal courthouse will remain closed. Surely, this was not what this Court intended in Parratt v. Taylor.

If this Court grants certiorari and agrees with Petitioner that a state prisoner who suffers bodily injury as a result of a state prison employee's negligence is entitled to a remedy, the Court certainly will want to address the knotty question raised by Judge Phillips' dissent: how can a federal court "determine whether an otherwise adequate post-deprivation state remedy is made inadequate because of the possible availability of a sovereign immunity, or other official immunity defense to the generally cognizable state-law claim." (App. I at 18). It must be undesirable for both state and federal courts to compel a prisoner to bring two actions and to litigate the first to completion in state court in order to see whether an official or sovereign immunity defense prevails, and if it does, to permit the prisoner to relitigate the action in federal court. Judge

Phillips suggested that dismissal of a § 1983 claim should be conditioned on abandonment or waiver by the state of any sovereign immunity defense it might assert, or the entry of an authoritative judgment by the state court that the defense does not exist. (App. I at 19).

If Parratt v. Taylor is held to apply to deprivations of liberty, Petitioner would ask this Court to adopt a modification of Judge Phillips' approach that would bar a § 1983 action in federal court following the assertion of sovereign immunity as a defense in state court only where the defendant conclusively abandoned the defense in state court. To bar a § 1983 suit following a judicial judgment that sovereign immunity is an invalid defense raises the spec[illegible]e of a prisoner having to fight a case through the Virginia Su[illegible]me Court prior to knowing whether the defense applies. And should the Virginia Supreme Court hold that it does, the prisoner would then sue a second time, this time in federal court. Double litigation cannot benefit anyone, and Petitioner would ask this Court, if it finds that Parratt v. Taylor extends to liberty deprivations, to address the important question of federal-state relations and to resolve it in a way that eases the burden on prisoners as well as on state and federal cou[illegible]s.

CONCLUSION

Because Petitioner believes that the issues raised in this petition present important questions of federal law, that the court of appeals departed from decisions of this Court, and that lower courts are in conflict on the issues presented, he respectfully asks this Court to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully yours,

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APPENDIX I

Fourth Circuit En Banc Opinion

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-6538*

ROY E. DANIELS

Appellant

v.

ANDREW WILLIAMS, Deputy.

Appellee

Appeal from the Eastern District of Virginia, at Richmond, Richard L. Williams, District Judge. (CA 82-0106-R)

On Petition for Rehearing:

Argued: December 6, 1983 Decided November 16, 1984

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, sitting en banc.

Russell Williams, Third Year Law Student (Robert E. Shepherd, Jr., University of Richmond School of Law, Patricia L. Harrington, Third Year Law Student, on brief), Stephen Saltzburg, for Appellants; James W. Hopper, Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia, on brief) for Appellees.

* This case was argued together with Ausley v. Mitchell, No. 82-6128, and Poole v. Morris, No. 82-6143.

WIDENER, Circuit Judge:

This case is an appeal from a judgment for the defendant in an action brought under 42 U.S.C. § 1983. We affirm.

Roy Daniels was a prisoner in the Richmond city jail on January 23, 1982, when he slipped and fell on a pillow and newspapers negligently left on some stairsteps by the defendant Williams, a deputy sheriff. The fall resulted in injuries to Daniels' back and ankle, for which he received medical treatment. While the facts surrounding Daniels' fall may be disputed, the district court found a common law negligence remedy available to Daniels and dismissed the case for failure to state a cause of action. Thus, for the purposes of this opinion, we assume that Daniels fell and that his fall was caused by Williams' negligence.

Daniels' suit must fail for two alternate reasons, either of which is fatal to his claim. The first is that we are of opinion Daniels' bodily injury occasioned by simple negligence was not a liberty interest protected by the due process clause.[1] Second,

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[1]There is no claim of any substantive due process violation. The facts here are not nearly aggravated enough to even make the proposition arguable. See, generally, Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

even if Daniels had a liberty interest violated by the negligence of Williams, then he had a remedy under the law of Virginia which satisfied the requirements of procedural due process.

I.

Parratt v. Taylor, 451 U.S. 527 (1981), decided that the negligent loss of two packages of hobby materials, belonging to one prisoner, and lost by a prison employee and another prisoner, was a deprivation of property under the Fourteenth Amendment. Parratt p. 536-537. The Court went on to decide, however, that because Nebraska provided a tort remedy as a means of redress for property deprivation, the deprivation was not without due process of law.

Until Parratt was decided, in this circuit a claim of mere negligence did not give rise to a cause of action under § 1983. We decided that explicitly in Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), in which, however, we granted relief in a case where the defendant's actions were variously described to be gross and culpable, wanton and a raw abuse of power, but falling short of an intentional act. So our decision in Jenkins so far as property is concerned now gives way to Parratt.[2]

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[2]While the dissenting opinion's analysis of the majority's position, that of extraordinary reluctance to change circuit
(Footnote Continued)

We do not believe the Court intended Parratt to be applied automatically in a per se manner in every instance in which an act of negligence can also be stated as a § 1983 claim. The Court itself noted, at p. 534, quoting Baker v. McCollan, that "[T]he question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action."

In Parratt, the concluding paragraph of the opinion of the Court took pains to explicitly disavow construing its decision so that it might result in "turning every alleged injury which may have been inflicted by a state official acting under 'color of

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(Footnote Continued)
precedent, may have been helpful in staking out its position, it sets up a strawman to disagree with. Of course the reasoning of Jenkins is not consistent with Parratt, as Parratt makes mere negligence actionable, while Jenkins requires more, and, of course, circuit precedent must give way to the superior authority of the Supreme Court. Even the suggestion that these propositions are not acknowledged by the majority is too far fetched to merit more than summary denial. But recognition of the fact that the result which Jenkins would obtain when applied to a negligent injury to the person happens to agree with the result required by Parratt in the same situation, indicates not a reluctance on the part of the majority to change circuit precedent, rather the failure of the dissent to acknowledge that Parratt and Jenkins require similar results on the same fact situation but for different reasons as the majority opinion indicates. We follow Parratt.

law' into a violation of the Fourteenth Amendment cognizable under § 1983." 451 U.S. at 544. The Court continued:

> "It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever circumstance may already be administered by the States.' Paul v. Davis, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." 451 U.S. at 544.

Thus, the Court, by explicitly rejecting a construction of its opinion which would permit maintaining a § 1983 claim for bodily injuries based on the negligent operation of an automobile by a state official acting under color of law, has limited its decision. Because we doubt that the Court intended to convey the impression that a prisoner suffering bodily injury from the negligence of a state official stands on a better footing than an ordinary citizen so injured, we think the Court intended to limit its decision to claims for the deprivation of property asserted by a prisoner, and we so hold. The difference in treatment between a prisoner's property and his person may easily be

justified. The demands of prison safety, life, and discipline make it obligatory for prison officials to have possession of, and search at some time or another, all of the property belonging to every prisoner. Prisons could be operated in no other fashion. Because the state of necessity has such complete control of the prisoner's property, calling it to account for the unexplained loss thereof is not inconsistent with demands of the Fourteenth Amendment. No such reasons exist, however, to set the prisoner above the ordinary citizen in the protection of his person. If the ordinary citizen may not sue under § 1983 a state employee who has negligently deprived him of a liberty interest by injury to his person, then the prisoner should not be allowed to prosecute a similar claim. The Supreme Court has expressed the same thought in a different context. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,"[3] neither should negligent injury to the person.

We are thus of opinion the negligent injury to the plaintiff's person is not a protectable liberty interest under the due process clause and the complaint does not state a cause of action under § 1983 on that account.

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[3] Estelle v. Gamble, 429 U.S. 97, 106 (1976).

II.

It is not disputed that in Virginia at all times here pertinent a common law tort action for negligence might have been maintained against a state employee performing ministerial duties. While the State is immune,[4] see James v. Jane, 221 Va. 43, 267 S.E.2d 108, 113 (1980), the employee is not. First Virginia Bank-Colonial v. Baker, 225 Va.___, 301 S.E.2d 8 (1983). The sovereign immunity which may attach to employees performing discretionary duties does not attach to those performing ministerial acts.

This was made clear in our recent case of Phelps v. Anderson, 700 F.2d 147 (4th Cir. 1983), and most recently, as we have noted above, by First Virginia Bank-Colonial in the state courts. In Phelps, prison employees had negligently deprived a prisoner of the use of his television set for a period of time. A prison adjustment committee had decided that the plaintiff owned the set and the prison employees' negligent failure to return the set to the rightful owner, we held, was an act in which they had no discretion, and accordingly, because that prisoner had the right to proceed under Virginia law, we held

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[4]Virginia recently enacted a Tort Claims Act, Va. Code § 8.01-195.1 et seq (Supp. 1982), which applies to acts occurring on or after July 1, 1982, and which surrenders the immunity of the Commonwealth for certain torts under specified conditions. That statute, of course, would have no effect in this case.

that Parratt barred his § 1983 claim. In First Virginia Bank the suit was against the clerk of a court whose deputy had negligently indexed a deed of trust on the wrong page of the index book. The Virginia court held that act to be ministerial and allowed a suit to proceed against the clerk on account of the negligence of the deputy.

In the case at hand, there is no claim that the deputy sheriff, Williams, was exercising any discretionary duty when he left the pillow on the stairsteps, so his actions at the most, looking at the case in the best light from Daniels' side, were merely ministerial. Because Williams' duties were ministerial, it was possible for Daniels to maintain an action in the Virginia courts on account of his injury without being met with the defense of sovereign immunity. Thus, even if Daniels were deprived of a liberty interest protected by the Fourteenth Amendment, the deprivation was not without due process of law under Parratt because a post-deprivation remedy was available in the state courts.

The plaintiff argues that sovereign immunity is available to Daniels as a defense, and it follows, the argument goes, that if sovereign immunity is available as a defense, any remedy he may have under state law may be inadequate and not in fact a remedy. The defendant argues that any immunity which may exist under state law is little different from the immunity afforded state

officials in the federal courts in suits under § 1983, and continues that since the immunities involved are akin, even if not the same, then the existence of immunity should not serve to permit the suit to be maintained. Because we believe there is no significant difference in the duties of the deputy sheriff in this case, the prison officials in Phelps, and the deputy clerk of the court in Baker, we think the duties of Williams were ministerial and do not reach the question of whether or not the existence of a possible immunity defense should permit the action to be maintained under § 1983.[5]

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[5]We have grave doubt that the immunity question, whether the acts complained of were discretionary or ministerial, has any proper place in this case in any event, since the case involves a sheriff and not some other public employee or officer. In Dabney v. Taliaferro, 25 Va. (4 Rand.) 256 (1826), the court held that a sheriff was held to a standard of ordinary care ("omission and neglect" was the exact phraseology) in the keeping of a prisoner by a contract jailer. If a suit may be maintained against a sheriff directly, it could probably be maintained against a deputy, and, even if not, the remedy afforded against the sheriff would satisfy the requirements of Parratt.

Our position with respect to this matter is supported by the statement in First Virginia Bank that ". . .we find no logic in a rule that exempts him [a clerk of the court] from the doctrine of respondeat superior whether the wrong committed by his deputy is discretionary or ministerial in character." 301 S.E.2d at p. 12. First Virginia Bank also noted with approval Moore's Adm. v. Dawney, et al., 13 Va. (3 H.&M.) 127 (1808), and the statement in that case that "[t]he law looks upon the sheriff and his officers as one person; he is to look to his officers that they do their duty; for if they transgress, he is answerable to the party injured by such transgression; and his officers are answerable over to him." 13 Va. (3 H.&M.) at p. 132; 301 S.E.2d at p. 11, n. 3.

(Footnote Continued)

The judgment of the district court is

AFFIRMED.

(Footnote Continued)

Because the parties have not approached the case from this angle, we express no opinion on the subject, but, to repeat, whether or not there is necessarily any immunity question in the case seems doubtful.

PHILLIPS, Circuit Judge, dissenting in part
and concurring in part:

The majority affirms dismissal of Daniels's claim under 42 U.S.C. § 1983 on alternative grounds. First, that as a matter of general principle there is no constitutionally protected liberty interest in being free of bodily injury caused by merely negligent, as opposed to intentional, conduct of state agents, or, put differently, that the merely negligent infliction of bodily injury by a state agent does not constitute "deprivation" of any constitutionally protected liberty interest; second, that even if such an interest in general exists, or such a deprivation might in general occur, any deprivation occurring here was not without due process because the state provides an adequate post-deprivation remedy for Daniels in the form of a traditional common law personal injury negligence action. Since § 1983 requires proof both that there has been deprivation of a constitutionally protected liberty (or property) interest and that it shall have occurred without due process, no cognizable § 1983 claim is here stated.

I disagree with the first ground.

On the second, I agree that with respect to the kind of negligent deprivation of liberty interest here involved a state's post-deprivation tort remedy may provide the process constitutionally due; but I do not believe that due process is provided if a sovereign immunity defense is available to bar

the state's post-deprivation remedy. And because I do not believe that on the record before us we can determine whether that defense is so available, I would only affirm dismissal of this § 1983 claim on condition that it might be reinstated if the defense is drawn upon to bar his state claim in state court.

I therefore dissent to the outright dismissal mandated by the majority.

I

As I understand the majority's reasoning on the first ground - that there is no constitutionally protected liberty interest in being free of bodily injury inflicted negligently by state agents - it runs as follows. Until Parratt v. Taylor, 451 U.S. 527 (1981), decided that one could be "deprived" of a constitutionally protected property interest by negligent conduct of state agents, the law of this circuit had been that only intentional conduct could "deprive" of either property or liberty interests. Parratt decided only that one might be so deprived of property interests; hence prior circuit law respecting the deprivation of liberty interests is unaffected by intervening Supreme Court authority and remains that one may not be so deprived of liberty interests. By implication, circuit law on liberty interests should not in this case be brought into conformity with Parratt's new dispensation as to property interests, because

there are rational bases for maintaining the distinction first necessitated by Parratt.

With respect, I simply disagree with this analysis.

First off, I do not believe that the critical principles that emerged from Parratt can be read as being narrowly confined to property interests. It is true that the case was about a property interest so that the specific holding is so limited, but the threshold issue identified and addressed in the majority opinion was "whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532. And this issue was answered affirmatively, if somewhat obliquely, in the same broad terms in which it was put by the Court: "§ 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind." 451 U.S. at 535.

All of the other Justices writing in the case assumed that a necessary implication of the majority's holding on this point was that it applied to liberty as well as property interests. Justice Powell, concurring, was principally concerned that "deprivation" should not be construed to cover any but intentional acts, and he unmistakably assumed, as his references show, that the Court's opinion applied to deprivations of liberty as well as property interests. 451 U.S. 546-554 & nn.6, 7, 9. Justice Stewart, concurring, also plainly

assumed that the majority's specific holding that deprivations of property might be by negligent conduct necessarily would apply in logic as well to deprivations of liberty. 451 U.S. at 544-45 (Stewart, J., concurring). Justice Blackmun, concurring, joined by Justice White, was only concerned that the majority's post-deprivation remedy analysis should be confined to property cases and not extended to claimed deprivations of life or liberty, clearly assuming that deprivation of either might be by negligent or intentional conduct. 451 U.S. at 545-46.

I therefore believe that whatever may have been the pre-Parratt state of circuit law, Parratt made it plain as national law that whether challenged conduct was negligent or intentional is irrelevant to the threshold § 1983 question whether it was committed under color of state law and whether it deprived a person of federally secured rights, see Parratt, 451 U.S. at 535, and that this is true whether the rights allegedly violated involved property or liberty interests.[1]

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[1] The majority here relies heavily on the Parratt majority's specific expression of concern about § 1983 being extended to cover "an automobile accident with a state official," see 451 U.S. at 544, as showing an intention by that Parratt Court to confine its "deprivation by negligence" holding to cases involving property interests. But the language quoted occurs in a passage laying out a general justification for finding in state post-deprivation remedies an appropriate means by which to prevent § 1983's extension to all negligence cases. Indeed, the Parratt Court's hypothetical automobile accident could presumably have given rise both to property damage and personal injury claims; the Court is saying that both are being kept out of § 1983's reach by the post-deprivation remedy solution.

Furthermore, I doubt that it is accurate to suggest that before Parratt, this circuit had never recognized any § 1983 claim based on mere negligence. Certainly we had recognized such claims in the congruent eighth amendment context. See, e.g., Withers v. Levine, 615 F.2d 158, 162 (4th Cir.), cert. denied, 449 U.S. 827 (1980) (negligent failure to protect prison inmate against known threats of physical harm).[2]

Finally, with all deference, I simply cannot accept the majority's apparent holding that somehow the fourteenth amendment imposes a more stringent duty upon the states to avoid

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[2] The majority says that in Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), we had decided explicitly that a claim of "mere negligence" did not give rise to a cause of action under § 1983. With all deference, I suggest that the language referred to in Jenkins was dicta that has necessarily been treated as such in later pre-Parratt cases such as Withers. See also McCray v. Maryland, 456 F.2d 1, 5 (4th Cir. 1972) (Sobeloff, J.) (holding that "a section 1983 action may be based on negligence when it leads to a deprivation of rights," citing Jenkins).

The specific holding in Jenkins was that the non-intentional infliction of harm there in issue was cognizable in § 1983 because of its particular quality of wantonness and degree. This was thought to amount to a "substantive due process" violation, and the language referred to by the majority was simply setting in contrast negligent inflictions of harm not rising to that level. In retrospect, Jenkins and other pre-Parratt substantive due process decisions are properly seen as harbingers of the principle that for some deprivations of secured interests - including those caused by "mere negligence" - post-deprivation state remedies may supply the process constitutionally due that makes them not cognizable under § 1983. Thus the holdings of those cases are not that "mere negligence" can never deprive of constitutionally secured interests and thus support cognizable § 1983 claims, but that some such deprivations are of such a character that no state post-deprivation remedy could constitute due process. See Palmer v. Hudson, ___ U.S. ___, ___, 52 U.S.L.W. 5052, 5058 n.4 (U.S. July 3, 1984) (Nos. 82-1630 and 82-6695) (Stevens, J., concurring).

deprivations of the property than the liberty interests of either their prison inmates or citizens in their free societies. If there is a constitutional scale of values associated with the two kinds of interests, the majority's analysis seems to me to stand on its head the obvious rank order that would be assigned them. See Parratt, 451 U.S. at 542 (suggesting that an intentional deprivation of liberty interests is "arguably . . . more egregious" than a negligent deprivation of property interests); id. at 545 (Blackmun, J., concurring) (suggesting that deprivations of liberty interest might not be adequately remedied by state post-deprivation process though deprivations of property interests could be). Certainly in purely human terms it would be difficult to suppose that the Constitution assigned less value to the concededly modest bodily harm allegedly suffered in this case than the Supreme Court in Parratt held that it assigned to the loss of a $23.50 hobby kit.

I would therefore hold, contrary to the majority, that Daniels's complaint states a cognizable § 1983 claim that he was deprived of a liberty interest by the defendant acting under color of state law. This would then lead to the question whether the complaint had also sufficiently alleged that the deprivation was without due process.

II

On the due process question, I think it plain that Parratt's principal holding that a state's post-deprivation remedies may supply the due process that suffices to defeat an otherwise cognizable claim of rights deprivation under § 1983 applies to liberty as well as property interests. Indeed, the general principle had already been established in the pre-Parratt liberty interest case of Ingraham v. Wright, 430 U.S. 651 (1977) (school paddling), a point the Parratt Court expressly recognized and relied upon. See Parratt, 451 U.S. at 542 (court's post-deprivation remedy analysis asserted to be "quite consistent with the approach taken . . . in Ingraham"). Accordingly, I accept that Virginia's ordinary tort remedies (irrespective of any special state Tort Claims Act remedies later provided) might supply the due process that would defeat a § 1983 claim such as Daniels's.

But I would hold that if under state law the defendant in this case could avoid liability on Daniels's state-law claim by the defense of sovereign immunity, the state's post-deprivation remedy does not provide for Daniels the adequate state remedy required to defeat his § 1983 claim on Parratt/Ingraham grounds. See Parratt, 451 U.S. at 551 n.9 (Powell, J., concurring).3/

(Footnote 3 on next page)

III

But this in turn, then leads to the difficult question of how, in this or any case, a federal § 1983 court is to determine whether an otherwise adequate post-deprivation state remedy is made inadequate because of the possible availability of a sovereign immunity, or other official immunity, defense to the generally cognizable state-law claim. Of course, no problem would exist where state law on the point is clear, or is stipulated, or possibly where the defense though available is waived for a particular case. But that, regrettably, is not the case we have. Here, the availability and scope of the defense is by no means clear on the record before us.[4]

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[3] The state suggests that even if sovereign immunity is available to defeat a parallel state tort claim, this cannot be held to negate the adequacy of the state's post-deprivation remedy as due process, given the fact that the availability of a qualified immunity defense to § 1983 claims is not thought to raise any due process questions. There is an element of plausibility in this, but I think it could present a serious question only if the available state immunity defense were no broader than the qualified immunity defense under § 1983. There is no suggestion here of that, and the question can therefore be reserved for another day.

[4] The majority avoids specific decision on this issue by assuming that if the existence of a sovereign immunity defense could make a state's post-deprivation process inadequate for § 1983 purposes, no such defense would be available under state law to the defendant here, either because the duties in question were ministerial or because no sovereign immunity defense is available to a sheriff (or his deputy) as distinguished from other state officials. For reasons explained in Judge Winter's opinion in the companion cases, No. 82-6128, Ausley v. Mitchell and No. 82-6143, Poole v. Morris, and because of

(Continued on next page)

And indeed, the problem is aggravated here by the fact that though the Commonwealth argues before us that the state remedy is not made inadequate by that means, we are told that in the parallel state action it has raised sovereign immunity as a defense.

In this situation, I believe that the only fair course for a federal § 1983 court - certainly the only fair one for the claimant - is to condition dismissal of the § 1983 action on the abandonment or waiver by the state of any sovereign immunity defense it might assert, or the entry of an authoritative judgment by the state court that the defense does not bar the claimant's state claim.

Accordingly, I would remand to the district court with instructions to dismiss on those conditions, leaving to claimant the right to reinstate his § 1983 claim upon the entry of any judgment in his state action holding his state claim barred by sovereign immunity.

(fn. 4 continued)
the state's litigation positions in this and the parallel state action, I do not believe that the assumption that no sovereign immunity defense will be available in the state action can - in fairness to claimant - be indulged by this court as the basis for dismissal.

Judge Winter and Judge Murnaghan authorize me to say that they join in this opinion. Judge Ervin authorizes me to say that he concurs in part I of this opinion.

ERVIN, Circuit Judge, concurring in part and dissenting in part:

I concur in Part II of the majority opinion and in the decision to affirm the judgment of the district court.

I am unable, however, to accept the rationale contained in Part I of the majority opinion, and I respectfully dissent therefrom, for the reasons cogently stated by Judge Phillips in Part I of his dissenting opinion, in which I join.

APPENDIX II

Fourth Circuit Panel Opinion

Ray E. DANIELS, Appellant,

v.

Andrew WILLIAMS, Deputy, Appellee.

No. 82-6838.

United States Court of Appeals, Fourth Circuit.

Argued May 13, 1983.

Decided Aug. 24, 1983.

Inmate brought civil rights action against deputy sheriff to recover for injuries sustained when he slipped and fell on a pillow left on stairs by the deputy. The United States District Court for the Eastern District of Virginia, Richard L. Williams, J., granted deputy's motion for summary judgment, and inmate appealed. The Court of Appeals, Turk, Chief District Judge, sitting by designation, held that: (1) United States Supreme Court decision providing that a meaningful postdeprivation hearing satisfies the requirements of procedural due process in situations where property deprivation does not result from established state procedure and state cannot practically provide a meaningful predeprivation hearing applies also to deprivations of nonproperty interests which do not violate substantive constitutional rights, including negligent deprivation of the liberty interest in freedom from bodily injury, and (2) inmate's allegation that he was injured when he slipped and fell on a pillow negligently left on stairs by deputy sheriff failed to state a procedural due process claim, because state's common-law tort action provided inmate with a remedy which would fully compensate him for alleged liberty deprivation, despite the possibility of a sovereign immunity defense.

Affirmed.

1. Civil Rights ⇐13.9

Exhaustion of state judicial or administrative remedies is not a prerequisite to a section 1983 action, except for those cases falling under the narrow exhaustion scheme embodied in provision governing civil action brought on behalf of institutionalized persons. 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 2, 42 U.S.C.A. § 1997.

2. Constitutional Law ⇐254.1

"Liberty" within the meaning of the Fourteenth Amendment includes the right to be free from unjustified intrusions on personal security, and therefore, bodily injury resulting from a state official's negligence deprives a person of a liberty interest protected by the Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇐254.1

United States Supreme Court decision providing that a meaningful postdeprivation hearing satisfies the requirements of procedural due process in situations where property deprivation does not result from established state procedure and state cannot practically provide a meaningful predeprivation hearing applies also to deprivations of nonproperty interests which do not violate substantive constitutional rights, including negligent deprivation of the liberty interest in freedom from bodily injury. U.S.C.A. Const.Amend. 14.

4. Civil Rights ⇐13.9

In cases involving alleged violations of substantive constitutional rights, the presence or absence of a state remedy is irrelevant to whether a claim is stated under section 1983. 42 U.S.C.A. § 1983.

5. Constitutional Law ⇐268(3)

While due process may sometimes require a state to consider the merits of a plaintiff's charge before deciding whether to terminate his claim, it does not entitle every civil litigant to a hearing on the merits in every case; rather, due process requires an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⇐268(1)

Sovereign immunity does not itself violate due process. U.S.C.A. Const.Amend. 14.

7. Civil Rights ⇐13.12(7)

Inmate's allegation in civil rights complaint that he was injured when he slipped and fell on a pillow negligently left on stairs by deputy sheriff failed to state a procedural due process claim, because state's common-law tort action provided inmate with a remedy which would fully compensate him for the alleged liberty deprivation, despite the possibility of a sovereign immunity defense. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

Louis James Lisnia, Third Year Law Student (Professor Stephen A. Saltzburg, University of Virginia Law School, Charlottesville, Va., on brief), for appellant.

Dennis A. Barbour, Roanoke, Va. (James W. Hopper, Gardner, Moss, Brown & Hopper, P.C., Roanoke, Va., on brief), for appellee.

Before HALL and SPROUSE, Circuit Judges, and TURK,* Chief Judge.**

TURK, Chief Judge:

Roy E. Daniels (Daniels), an inmate at the Richmond City Jail, brought this section 1983 action against Deputy-Sheriff Andrew Williams (Williams) alleging that he was injured when he slipped and fell on a pillow negligently left on the stairs by Williams. The district court granted Williams's motion for summary judgment, reasoning that under *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), Daniels's allegations failed to state a procedural due process claim because Virginia provided a meaningful postdeprivation remedy in the form of a common law negligence action. Daniels appeals on the grounds that *Parratt*'s analysis concerning the adequacy of a postdeprivation remedy should not be applied to the deprivation of a nonproperty interest, and, even if it does apply, that the Virginia doctrine of sovereign immunity denies him an adequate postdeprivation remedy. We affirm the district court's dismissal of Daniels's action.

A.

[1] The plaintiff in *Parratt* alleged that he was deprived of property without due process of law when prison officials negligently lost his hobby kit. The Court agreed that the plaintiff had been deprived of property within the meaning of the fourteenth amendment. *Id.* at 536-537, 101 S.Ct. at 1913-1914. The Court held, however, that the plaintiff had not stated a claim for a violation of the due process clause of the fourteenth amendment. Rejecting the proposition that due process always requires a hearing before the initial property deprivation, Justice Rehnquist stated in a plurality opinion that a meaningful postdeprivation hearing satisfies the requirements of procedural due process in situations where the property deprivation does not result from established state procedure and the state cannot practically provide a meaningful predeprivation hearing. *Id.* at 540-541, 101 S.Ct. at 1915-1916. Applying this principle to the plaintiff's allegation that he was tortiously deprived of his property as a result of a state employee's random and unauthorized act, the Court concluded that the plaintiff was not deprived of property without due process of law because the state's statutory tort procedure provided him with a postdeprivation remedy that satisfied the requirements of procedural due process.[1] *Id.* at 543-544, 101 S.Ct. at 1916-1917.

[2] Like the plaintiff in *Parratt*, Daniels alleges that he was injured by the negligence of a state employee. Unlike in *Parratt*, Daniels's claim is for bodily injury rather than for the loss of personal property. "Liberty" within the meaning of the fourteenth amendment includes the right to be free from "unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977). Bodily injury resulting from a state official's negligence therefore deprives a person of a liberty interest protected by the fourteenth amendment.[2] This case thus presents the question whether the *Parratt* analysis applies to nonproperty deprivations, such as a negligent deprivation of a liberty interest.

[3] *Parratt* concerned a property interest; its scope, however, "cannot easily be limited to negligent deprivations of property." *Palmer v. Hudson*, 697 F.2d 1220, 1222 (4th Cir.1983), *cert. granted*, — U.S. —, 103 S.Ct. 3555, 77 L.Ed.2d 1396 (1983). Because *Parratt*'s underlying principle is that a postdeprivation hearing will satisfy procedural due process when there is no practical way to provide a predeprivation hearing, logic dictates that *Parratt* should also apply to a nonproperty deprivation for which a predeprivation hearing was impractical. Justice Rehnquist made no distinction in *Parratt* between property and nonproperty deprivations. Rather, the relevant distinction is between isolated acts of misconduct which are not amenable to prior control and deprivations resulting from established state procedure; this factor determines whether a meaningful postdeprivation remedy will satisfy the requirements of procedural due process.

In addition, application of *Parratt* to nonproperty deprivations such as Daniels's alleged bodily injury is consistent with the Court's stated goal in *Parratt* to provide courts with assistance in determining "the correct manner in which to analyze claims . . . which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts, but instead are couched in terms of constitutional deprivation and relief is sought under

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* Honorable James C. Turk, Chief United States District Judge for the Western District of Virginia, sitting by designation.

** Judge Sprouse was not present during oral argument; however, counsel agreed that he could participate by listening to the tapes.

1. Exhaustion of state judicial or administrative remedies is not a prerequisite to section 1983 actions, *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), except for those cases falling under the narrow exhaustion scheme embodied in 42 U.S.C. § 1997. *See Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). *Parratt* does not change this rule. An exhaustion requirement would merely require a plaintiff to exhaust his state remedies before bringing a section 1983 action in federal court. *Parratt*, by contrast, stands for the proposition that a plaintiff may sue only in state court if he fails to state a procedural due process claim under section 1983. Unlike an exhaustion requirement, which is based upon principles of comity, the *Parratt* analysis is based upon the concept that there is no constitutional violation if a plaintiff has not been deprived of a protected interest without due process of law.

2. Some bodily injuries also implicate a protected property interest, as is recognized by the existence of a common law tort action to recover damages for negligently caused personal injuries. However, because *Parratt* expressly op-

§ 1983." *Id.* 451 U.S. at 530, 101 S.Ct. at 1913.

The conclusion that *Parratt* was intended to apply to all types of deprivations resulting from the unauthorized acts of state officials which are not amenable to prior review is further reinforced by the concurring opinion of Justice Powell. Justice Powell argued that the alleged negligent loss of the plaintiff's property by the state officials did not constitute a deprivation of property within the meaning of the fourteenth amendment. *Id.* at 546, 101 S.Ct. at 1918. And he criticized the Court's focus on the adequacy of the postdeprivation remedy because such would make the fourteenth amendment a font of tort law whenever a state failed to provide a remedy. *Id.* at 550, 101 S.Ct. at 1920. In so doing, however, he recognized that the Court's analysis applies to "negligent invasions of liberty or property interests." *Id.*

Moreover, *Ingraham v. Wright*, *supra*, is cited by the Court as being consistent with the approach taken in *Parratt*. 451 U.S. at 542 and 547, n. 1, 101 S.Ct. at 1916 and 1919, n. 1 (Powell, J., concurring in result). In *Ingraham*, the Court addressed the claim that corporal punishment in public schools violated due process. *See* 430 U.S. at 653, 97 S.Ct. at 1408. The Court held that corporal punishment in public schools did not deprive school children of liberty without due process of law because, among other things, "the traditional common-law remedies are fully adequate to afford due process." *Id.* at 672, 97 S.Ct. at 1418. *Parratt*'s citation of *Ingraham* with approval is compelling evidence that the Court intended the *Parratt* analysis to apply to deprivations of liberty interests.

Not all the justices who joined in the Court's decision in *Parratt* believed that it applied to nonproperty deprivations. Justice Blackmun, with whom Justice White concurred, did "not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty." 451 U.S. at 545, 101 S.Ct. at 1918. But Justices Blackmun and White offered no persuasive reason for their distinction between property and nonproperty deprivations. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), cited as different yet analogous precedent supporting this distinction, concerned a substantive due process claim, *see id.* at 502–03, 97 S.Ct. at 1937–38, and thus is distinguishable from cases, such as this one, involving alleged procedural due process violations.

Although Daniels concedes that not every liberty deprivation by a state official should be redressed by an action under section 1983, he stresses that the state has an affirmative duty to protect inmates because of the high level of state control in the prison environment. And he argues that *Parratt*'s analysis should not apply to this case because a section 1983 remedy is the only way to ensure the state's compliance with this duty. We believe, however, that the Virginia courts are no less diligent than the federal courts in protecting inmates from state inflicted harm. Moreover, there is nothing in *Parratt* which lends support to the proposition that its rationale applies differently to prisoners than to nonprisoners. Indeed, the fact that the plaintiff in *Parratt* was himself an inmate militates against the adoption of Daniels's proffered distinction.

[4] Therefore, we hold that the *Parratt* analysis applies to deprivations of nonproperty interests which do not violate substantive constitutional rights, including negligent deprivations of the liberty interest in freedom from bodily injury. *See Ellis v. Hamilton*, 669 F.2d 510 (7th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 466, 74 L.Ed.2d 621 (1982); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, — U.S. —, 103 S.Ct. 1483, 75 L.Ed.2d 418 (1983).[5]

Daniels alleges that Williams's negligence in leaving a pillow on the stairs deprived him of a liberty interest. There is no allegation that Daniels was injured as a result of some established state procedure. Nor was it possible for the state to provide a predeprivation hearing since the state could not predict when the alleged loss would

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plies to negligent property deprivations, our analysis will focus on Daniels' claim that he was deprived of liberty without procedural due process.

5. *See also Hickman v. Hudson*, 697 F.Supp. 1341 (W.D.Va.1983); *Jeanlar v. Tinney*, 540 F.Supp. 574 (D.Md.1982); *Holman v. Wampler*, 548 F.Supp. 903 (E.D.Va.1982); *Henderson v. Counts*, 544 F.Supp. 149 (E.D.Va.1982); *Peery v. Davis*, 524 F.Supp. 107 (E.D.Va.1981); *Steele v. Rosenfeld*, 524 F.Supp. 515 (N.D.Ill. 1981); *Maddox v. Abington Township*, 517 F.Supp. 1350 (E.D.Pa.1981); *but see Moore v. Duxbury Correctional Institute*, 537 F.Supp. 1177 (M.D.Tenn.1982); *Hayground v. Vinzant*, 537 F.Supp. 698 (E.D.Cal.1981).

We emphasize that our holding today is not intended to expand *Parratt*'s scope to every section 1983 action which resembles a state tort action. *Parratt* applies to only procedural due process claims involving deprivations that do not result from established state procedures and for which the state cannot practically provide a predeprivation hearing. Section 1983 still provides a remedy for procedural due process violations resulting from some established state procedure or for which a prior hearing is practical. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434–437, 102 S.Ct. 1148, 1157–1159, 71 L.Ed.2d 265 (1982), and for violations of substantive constitutional rights. *See Palmer*, 697 F.2d at 1333, n. 2. For example, *Parratt* is inapplicable to eighth amendment claims aris-

error. Consequently, *Parratt* applies to this case.

B.

Having decided that *Parratt* applies to this case, we must next determine whether Daniels has been deprived of liberty without due process of law. This in turn requires an evaluation of whether Virginia law provides him with a meaningful postdeprivation remedy.

Virginia law provides Daniels with a common law action for negligence.[4] Nevertheless, Daniels erroneously argues that the Virginia doctrine of sovereign immunity denies him an adequate postdeprivation remedy. *See Sabina v. Hutton*, No. 81-225-A.M (E.D.Va. Nov. 17, 1982) (unpublished).

In his answer, Williams invoked the defense of sovereign immunity from liability for his alleged negligence. The Supreme Court of Virginia has "listed certain factors to consider in determining whether a state employee is entitled to immunity when he or she is charged with simple negligence in the performance of some duty." *Bowers v. Commonwealth, Dept. of Highways and Transportation*, — Va. —, —, 302 S.E.2d 511, 514 (1983).

> Under such circumstances, [a court should] examine the function [the] employee was performing and the extent of the state's interest and involvement in that function. Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative .... Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved.

James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).

Daniels alleges that Williams negligently left a pillow on the stairway. Applying the ministerial-discretionary factor, a state court could overrule Williams's plea of immunity because (1) "most negligence underlying Daniels's claim was misfeasance of a ministerial duty. *See Phelps v. Anderson*, 700 F.2d 147, 149 (4th Cir.1983); *Bender v. Psychiatric Institute*, 588 F.2d 121, 127 (4th Cir.1978); *First Virginia Bank-Colonial v. Baker*, — Va. —, 301 S.E.2d 8 (1983); *Lawhorne v. Harlan*, 214 Va. 435, 200 S.E.2d 569 (1973). On the other hand, the state's interest and involvement in prison administration is great, and a state court may thus determine that Williams is entitled to immunity. *See Dubose v. Hutto*, No. LD 1181, Vol. 8, No. 1 VADA Quarterly 15 (Cir.Ct. Richmond, Nov. 29, 1982). In short, we cannot confidently predict whether sovereign immunity would apply in this case. Consequently, we must determine whether the possibility of a sovereign immunity defense deprives Daniels of an adequate postdeprivation remedy.

In responding to the argument that Nebraska's tort claims procedure did not adequately protect the plaintiff's property interest because it did not provide him with all the relief available in actions brought under section 1983, the Court held in *Parratt* that the state remedies were sufficient to satisfy the requirements of due process because the "remedies provided *could have* fully compensated the [plaintiff] for the property loss he suffered." 451 U.S. at 544, 101 S.Ct. at 1917 (emphasis added). Thus, *Parratt* does not require that a plaintiff actually receive a remedy for the deprivation of his interest. Instead, *Parratt* holds that procedural due process is satisfied if, in cases where a predeprivation hearing is impractical, the state provides a means by which the plaintiff can be compensated for his loss. In other words, under *Parratt* the requirements of due process are satisfied by the provision of a hearing before a tribunal with the power to grant a remedy. *See Grove v. Coe*, 559 F.Supp. 772 (E.D.Va. 1983).

[3] Daniels contends, however, that he is denied due process under *Parratt* because he could be precluded from bringing any claim in any court if his section 1983 action is dismissed and Williams's plea of immunity is sustained. While we agree that this result could deprive Daniels of a remedy, it does not follow that it would deprive him of his right to present a claim and be heard. To be sure, Daniels will be unable to litigate the merits of his claim if a state court determines that Williams is entitled to sovereign immunity. But while due process may sometimes require a state to consider the merits of a plaintiff's charge before deciding whether to terminate his claim, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), it does not entitle "every civil litigant to a

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ting out of a state official's *medical* malpractice or negligence which amounts to deliberate indifference to serious health and safety needs of prisoners. *See generally Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 848, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980). Similarly, *Parratt* would not apply to substantive due process violations resulting from a police officer's unjustified, brutal beating of a suspect, *see Henderson v. Cousins*, 560 F.Supp. at 152–153, or grossly negligent shooting of a suspect which amounts to a "conscience shocking" use of power. *Jenkins v. Averett*, 424 F.2d 1228, 1232 (4th Cir.1970). In these kinds of cases involving alleged violations of substantive constitutional rights, therefore, the presence or absence of a state remedy is irrelevant to whether a claim is stated under section 1983. Consequently, before dismissing a section 1983 action under *Parratt*, a court should scrutinize the complaint to ensure that it does not include allegations of violations of substantive constitutional rights in addition to an allegation of a procedural due process violation. *See generally Hickman v. Hudson*, *supra*; *Jennifer v. Tinsley*, *supra*; *Hudson v. Wampler*, *supra*; *Henderson v. Cousins*, *supra*.

4. Daniels's alleged injury occurred on January 23, 1982. The Virginia Tort Claims Act, Va. Code § 8.01–185.1 *et seq.* (Supp.1982), applies only to actions accruing on or after July 1, 1982. Under the Act, Virginia is made liable for negligent acts or omissions of state employees, but "[n]otwithstanding any provisions [of the Act], the individual immunity of judges, the Attorney General, Commonwealth's attorneys, and other public officers, their agents and employees from tort claims for damages is hereby preserved to the extent and degree that such persons are presently immunized." Va.Code § 8.01–195.3 (Supp.1982).

hearing on the merits [a ... ity case." *Id.* at 488, 108 S.Ct. at 1188. Rather, due process requires "an opportunity ... granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case ...." *Id.*, quoting *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (citations omitted). And we conclude that Virginia's common law tort action provides Daniels with a meaningful opportunity for a hearing appropriate to the nature of his claim.[5]

[6] Nor does sovereign immunity itself violate due process. "For when a state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Parratt v. Ackerman*, 466 U.S. 108, 108, 100 S.Ct. 468, 468, 62 L.Ed.2d 388 (1979); *see Martinez v. California*, 444 U.S. 277, 280-283, 100 S.Ct. 553, 556-558, 62 L.Ed.2d 481 (1980).

[7] Daniels further argues that the doctrine of sovereign immunity deprives him of a postdeprivation remedy at a meaningful time and in a meaningful manner. *See* 451 U.S. at 540, 101 S.Ct. at 1915. He asserts that, unlike litigation on the question of good faith in a section 1983 action, which is determined only after a full hearing on the merits, litigation on the issue of sovereign immunity precludes a hearing on the merits unless and until the plea of immunity is overruled. This may be true insofar as a determination of whether sovereign immunity applies is compared with a determination of whether qualified immunity applies in a section 1983 action. *But see Harlow v. Fitzgerald*, 457 U.S. 800, 817-819, 102 S.Ct. 2727, 2738-2739, 73 L.Ed.2d 396 (1982). Nevertheless, this argument overlooks the fact that due process is not violated by other affirmative defenses, such as the statute of limitations, which must be decided prior to litigation on the merits. And contrary to Daniels's assertion, he is no more denied a remedy at a meaningful time and in a meaningful manner by the chance that he may be required to litigate the question of sovereign immunity through the entire Virginia court system than he would be by having to appeal an adverse ruling on a plea of the statute of limitations. We therefore see no significant distinction between sovereign immunity and other defenses which persuades us that Daniels is denied an adequate postdeprivation remedy by the possibility that Williams may be entitled to immunity.

In sum, Virginia's common law tort action provides Daniels with a remedy which can fully compensate him for the alleged liberty deprivation. Thus, despite the possibility of a sovereign immunity defense, we hold that Daniels possesses a remedy which provides him with a "meaningful opportunity for a determination of rights and liabilities." 451 U.S. at 541, 101 S.Ct. at 1916. Consequently, we conclude that Daniels has failed to state an actionable claim under section 1983 because he has not been deprived of liberty without due process of law.

The judgment of the district court is AFFIRMED.

5. Our conclusion, of course, would be different if Virginia's sovereign immunity doctrine had the effect of depriving a prisoner of the right to bring a claim in state court and he based on the issue of sovereign immunity. *See Parratt*, 451 U.S. at 541, n. 5, 101 S.Ct. at 1915, n. 5 (Powell, J., concurring in result).

FILED
AUG 2 1982
CLERK, U. S. DIST. COURT
RICHMOND, VA.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

ROY E. DANIELS, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 82-0106-R
ANDREW WILLIAMS, Deputy, Defendant.	)	

MEMORANDUM OPINION

Plaintiff Roy E. Daniels is an inmate at the Richmond City Jail. He has filed a section 1983 action against Andrew Williams, a correctional deputy stationed at the jail. See 42 U.S.C. § 1983 (1976). The plaintiff seeks to recover damages for back and ankle injuries allegedly sustained when he fell on a prison stairway. Daniels asserts that he slipped on a pillow that Williams negligently left on the stairs. The defendant moves for summary judgment on the plaintiff's claim. See Fed. R. Civ. P. 56(b).

The court grants the defendant's motion for summary judgment, because the complaint does not state a valid section 1983 claim. Daniels' allegations amount to no more than a simple negligence claim. This claim does not implicate any substantive constitutional guarantees. The plaintiff instead must rely on the contention that the defendant denied him procedural due process.

Under Parratt v. Taylor, 451 U.S. 527 (1981), procedural due process requires only a meaningful postdeprivation remedy, unless the deprivation in question was pursuant to an established state procedure. See id. at 541. The Parratt decision dealt only with negligent property deprivations. See id. at 536-37. The court, however, holds that Parratt also applies to nonproperty deprivations such as the personal injury alleged here. See id. at 541; Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), cert. granted, 50 U.S.L.W. 3998.23 (July 2, 1982);

Irshad v. Spann, Civil No. 81-0456-R, slip op. at 6 n.1 (E.D. Va. July 19, 1982); Frazier v. Collins, 538 F. Supp. 603, 607 (E.D. Va. 1982).

The official misconduct for which Daniels seeks redress was an isolated action in violation of state procedure. The due process clause, therefore, requires only a meaningful post-deprivation remedy. See Parratt v. Taylor, 451 U.S. at 541; Irshad v. Spann, Civil No. 81-0456-R, slip op. at 5-6. Virginia law provides such a remedy in the form of a common-law negligence action. See id. at 7-10. Thus, the defendant's conduct did not violate the plaintiff's due process rights.

For these reasons, the court holds that Daniels' claim is not actionable under section 1983. The court, therefore, must dismiss his action.

Richard L. Williams
UNITED STATES DISTRICT JUDGE

Date: AUG 2 1982

APPENDIX IV

Companion Cases Decided En Banc with
Daniels v. Williams

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-6128*

RICHARD A. AUSLEY

Appellant

v.

J. P. MITCHELL, Warden,
Virginia State Penitentiary,
RAY CHAVIS, Recreational
Department,

Appellees

No. 82-6143*

WILLIAM POOLE, III

Appellant

v.

EDWARD C. MORRIS,
SAMUEL V. PRUETT,
GEORGE L. FURGESON,

Appellees

Appeals from the Eastern District of Virginia, No. 82-6128 at Norfolk, Richard B. Kellam, District Judge; No. 82-6143 at Richmond, David G. Lowe, Magistrate. (82-36-N;CA 81-0152-R)

On Petition for Rehearing:

Argued: December 6, 1983 Decided November 16, 1984

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, sitting en banc.

Russell Williams, Third Year Law Student (Robert E. Shepherd, Jr., University of Richmond School of Law, Patricia L. Harrington, Third Year Law Student, on brief), Stephen Saltzburg, for Appellants; James W. Hopper, Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia, on brief) for Appellees.

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* These cases were argued together with Daniels v. Williams, No. 82-6538.

WIDENER, Circuit Judge:

These two appeals were consolidated for argument from judgments in favor of defendants in actions under 42 U.S.C. § 1983. We affirm.

Richard Ausley, while an inmate at the Virginia state penitentiary, was sent some art supplies by his family on November 18, 1980. The supplies were picked up by him from the prison package room. He was informed, however, that the art supplies could not be taken from the recreation building. As the art department claimed it did not have facilities to store the materials, Ausley was forced to leave them in the recreational day room, from which they disappeared. He sues for their value.

William Poole, III, when he arrived at the Mecklenburg Correction Center on August 6, 1979, was told that he could not keep some of his personal property. He requested that such property be sent to his sister, Lucille Whittaker. On August 14, 1979, Poole received a set of 47 books. He was informed that he could not keep the entire set, so, rather than break it up, he elected to send it to a certain Becky Shields. The property officer negligently sent to Miss Shields both the personal property intended for Poole's sister and also the books. Poole

has not been able to obtain the return of his personal property and sues for its value.

There is no claim other than ordinary negligence asserted by either Ausley or Poole on account of the loss of their property, and its negligent loss states a § 1983 deprivation of property claim under Parratt v. Taylor, infra, unless with due process of law.[1]

These cases are covered by a straightforward application of Parratt v. Taylor, 451 U.S. 527 (1981); Phelps v. Anderson, 700 F.2d 147 (4th Cir. 1983); First Virginia Bank-Colonial v. Baker, 225 Va.___, 301 S.E.2d 8 (1983); and that part of Daniels v. Williams, No. 82-6538 (4th Cir. 1984) (en banc), decided this date, which relates to this case.

The duties of the prison employees in both cases now before us were merely ministerial. The state employee in Ausley's case had no discretion but to use ordinary care to keep the art supplies for Ausley, and, in Poole's case, to send the property involved to Poole's sister. Thus, actions could have been brought in the Virginia courts for the value of the property

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[1]Each of the courts below dismissed the complaints for the reason that Virginia law afforded a remedy for the property losses.

lost. That being true, although Ausley and Poole were negligently deprived of their property, the deprivations were not without due process of law under Parratt v. Taylor.

A sufficient alternate reason for our decision is that the inmates had an administrative remedy by way of grievance. Phelps v. Anderson, supra.

The judgments are accordingly

AFFIRMED.[2]

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[2]The separate opinion argues that the recent case of Bowers v. Com. Dept. of Highways & Transp., 302 S.E.2d 511 (Va. 1983), has introduced an uncertainty in the Virginia decisions respecting the immunity of state employees. It bases its reasoning principally on a quotation from Bowers that the distinction between discretionary acts (ordinarily immune) and ministerial acts (not ordinarily immune) is "but 'one of the indicia of entitlement to immunity,'" and describes the Bowers decision as a "recent development[. . .]." Bowers dealt with the act of a state employee which was admittedly discretionary.

While Bowers is a recent case, the rule is anything but in the context here. The quotation from Bowers seized upon is based upon James v. Jane, 282 S.E.2d 864 (Va. 1980).

In the sought-for time sequence, the reliance on Bowers is misplaced. James was in place and decided well before our opinion in Phelps v. Anderson, 700 F.2d 147 (4th Cir. 1983). Phelps held that Virginia afforded an adequate remedy in court for the negligent deprivation of use of a prisoner's television set by prison employees, and it depended explicitly upon the reasoning of James as authority for its holding, especially pages 50-55 of the Virginia Reports, Vol. 221. The employees' action complained of was a "simple ministerial act," 700 F.2d at 149.
(Footnote Continued)

(Footnote Continued)
and the court did not read into James the doubt now expressed in the separate opinion. Indeed, we note that the quotation from Bowers, upon which the separate opinion relies, depends on page 53 of James in the Virginia Reports, squarely in the middle of those pages depended upon by this court in Phelps. It is apparent that Phelps simply does not construe James in the same manner as would the separate opinion, and as we do not construe either James or Bowers. We reiterate our confidence in the holding of Phelps. The very recent case of Messina v. Burden, No. 811485, ___Va.___ (Oct. 12, 1984), is in accord with our conclusion.

To repeat, in Phelps we construed Virginia law as imposing liability on a state employee for the negligent performance of a ministerial act. The acts complained of here are certainly ministerial. Even if Virginia law may not be "certain[. . .]," separate op. p. 3, as to the immunity of state employees for the negligent performance of discretionary acts, it is certain that state employees negligently performing ministerial acts are not entitled to immunity. See, e.g., Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569, 571-572 (1973).

Along the same line, we held in Phelps that Virginia's grievance procedure ". . .also provided an adequate post-deprivation remedy for Phelps." 700 F.2d at 149. While the Department of Corrections, Division Guidelines, for the grievance procedure have been changed since the occurrence which caused the Phelps case, the new Guidelines are not less favorable to prisoners. They have been approved by the U. S. Attorney General under 42 U.S.C. § 1997e. Since the prison grievance procedure is an adequate remedy, it affords sufficient due process to bar the claims. Thus, even were the separate opinion to be correct in its reasoning with respect to immunity, it also would be necessary to reject the holding of Phelps with respect to an adequate grievance procedure in order to arrive at the conclusion that it does, i.e., the dismissal of the claim should be conditional. No reason is apparent to us why there should be a conditional dismissal of the claim in the face of an adequate grievance procedure. Phelps' holding is to the contrary. See also Hudson v. Palmer, 52 L.W 5052, 5057, n. 15 (U.S. 1984).

(Footnote Continued)

In this connection, footnote 2 of the minority opinion apparently takes the position that relief in any event is discretionary under the Virginia grievance procedure, although the grievance may admittedly have merit, and cites as support a statement made by the Assistant Attorney General at oral argument indicating that the scope of relief available is "a matter of discretion and not a matter of right." We think the minority errs in relying on only part of the colloquy concerning the discretion involved in the grievance procedure. When counsel stated that awards were "a matter of discretion," he was responding to various questions from the court regarding the adequacy of any remedy the discretion to award which was placed in the hands of a prison official who might be interested in or even be a defendant in the lawsuit. The discussion between the court and counsel dealt with the objectivity of such a hearing officer and whether or not discretion ought to be entrusted to such an officer to decide whether to give an award and the amount thereof. Taken in the entire context of the discussion, contrary to what the minority suggests, we think the attorney was not responding to whether the grievance procedure permitted arbitrary denials of awards otherwise authorized. In fact, counsel maintained that the grievance procedure was itself an adequate postdeprivation remedy despite the possible role of a prison official as hearing officer because of the presumption that an official will perform his duty in a lawful manner and the availability of an appeal from the initial determination through various levels in the penal system.

The discussion follows:

> Counsel: May it please the Court if I could just address the question of the availability of the state grievance procedure to Mr. Daniels. [As noted, Daniels' case was argued with these cases]. The grievance procedure which was recently certified by the United States Attorney General under the CRIP Act provides for possibility of monetary compensation for the loss of property. It has not been applied in a personal injury situation...The grievance procedure as currently certified is essentially the same grievance procedure that was in effect prior to certification. And, even prior to certification, some compensation had been awarded to inmates for property losses. I believe they had awarded amounts up to $125.

(Footnote Continued)

Court: There has been some suggestion that awards that are made are made in a way in which a court normally makes awards, on some independent objective factfinding determination. Here you have got one of the officials who may be one of the defendants in the lawsuit making the determination of how much money should be paid. That is hardly an adequate remedy in terms of objectivity and fairness.

Counsel: Well, your Honor, I would submit that the grievance procedure has built into it various levels of appeals and it goes from the warden of the institution all the way up to the director...

Court: But the basis on which awards are made is discretion, not a matter of right?

Counsel: I think that is a fair statement, your Honor, it is a matter of discretion and not a matter of right, based on all of the facts as they appear with some appeal process built into the system...

Court: Well, I just find it hard to say it is adequate when it is a matter of the discretionary determination of the prison official who is either himself or herself a defendant or has close connections with a person who is named as a defendant...

Counsel: Well, your Honor, I think we have to assume, and I think it is a correct assumption, that individuals are going to perform in a lawful manner. I think obviously this allegation that arises later that they didn't--a new cause of action has been stated and maybe that remedy is not adequate. But, until those facts are developed, or at least alleged, I think we must assume that prison officials will appropriately carry out their duties.

From this colloquy, it is apparent that counsel did not intend to suggest that the grievance procedure permitted arbitrary denials of otherwise authorized awards. To begin argument, counsel discussed the current guidelines for the grievance procedure which were recently certified by the United States Attorney General and commented that these guidelines were essentially the same as those in effect prior to certification. The current guidelines which were in effect at the time of oral argument establish available remedies and explicitly provide, inter alia:

(Footnote Continued)

> 4-14.3...The grievance procedure shall afford a successful grievant a meaningful remedy...Remedies must include, but not be limited to, the following:
> (h) Loss of inmate property within the custody and control of the unit--return of property, replacement of property of equal value at time of loss, or monetary payment equal to value of property at time of loss.

Department of Corrections Commonwealth of Virginia, Inmate Grievance Procedures (Feb. 14, 1983) (superseding prior certified guidelines issued Oct. 12, 1982).

By comparison, the precertification guidelines in broader language provided "...inmates with an administrative method for the settlement of grievances they have relating to their confinement." They gave inmates "a regularly available channel for the expression of their grievances," and were to "foster prompt solutions." Authority to decide the same was specificially provided: "The Superintendent will have the necessary authority to resolve inmate complaints filed pursuant to this Guideline." An administrative appeal from the decision of the Superintendent was provided for. Department of Corrections Commonwealth of Virginia Inmate Grievance Procedure (March 31, 1977). Significantly, to repeat, we held in Phelps that the grievance procedure under the precertification guidelines provided an adequate postdeprivation remedy for an aggrieved inmate. 700 F.2d at 149.

Implicit in counsel's reference to the current, as well as the precertification guidelines, is the fact that any award to an aggrieved party is based on the discretion of the factfinder in considering the merits of the complaint. We think counsel in no way suggested that discretion could be exercised arbitrarily to deny otherwise valid claims. Clearly, the basis for the awards under both the current and precertification guidelines would be an exercise of discretion on the part of the factfinder in addressing the merits of a complaint and, in this sense, awards would be a matter of discretion and not a matter of right. To the extent that the minority concludes from the statement of the attorney that awards are purely discretionary, thus implying that no adequate state remedy exists, it has failed to consider that, in addressing the issue of discretion involved in granting awards, the attorney obviously was responding that any award under the grievance procedure would be based on the discretion of the hearing officer in considering the merits of the complaint. This is no different than the way a federal district judge considers a case before him, or any other trial judge for that matter.

WINTER, Chief Judge, concurring in part:

In these two appeals, the principal question to my mind is whether Virginia affords a state-court state-law remedy for the property losses sustained by the two plaintiffs if they can prove their allegations of liability. Certainly Parratt v. Taylor, 451 U.S. 527 (1981), teaches that they have no cause of action under 42 U.S.C. § 1983 if they have a state remedy. To my mind also, the question of whether there is a state remedy depends upon a determination of whether Virginia would recognize the defense of sovereign immunity if the defense is pleaded in a state tort action in a state court.[1] The very recent decision in Hudson v. Palmer, ____ U.S. ____, ____, 52 U.S.L.W. 5052, 5057 (July 3, 1984) strongly suggests that if sovereign immunity is available as a defense, the requirements of Parratt to oust § 1983 jurisdiction would not be met.

The majority opinion concludes that Virginia would not recognize sovereign immunity as a defense were these actions pending in a state, and I am inclined to agree. In Palmer itself, the

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1. The record does not disclose if either plaintiff has instituted any action in a state court. In a companion case, consolidated for argument with these two appeals--No. 82-6538, Daniels v. Williams--plaintiff sued both in state and federal courts for personal injuries. In the state court action, defendant pleaded sovereign immunity while before us he contends that the defense is not available. Counsel for the defendants in his brief in these two cases argues that sovereign immunity will not be held to bar a state-court suit. Nevertheless, in oral argument he admits that he would advance a sovereign immunity defense in state court. Counsel's candor does not dispel the uncommendable inconsistency in his approach.

Court accepted the correctness of our statement that Palmer's claim for intentional destruction of his noncontraband property would not be barred by sovereign immunity if he asserted it in an action in a state court. We have also held in Phelps v. Anderson and Langford, 700 F.2d 147, 149 (4 Cir. 1983), that an inmate's claim for wrongful deprivation of his television receiver, asserted against two prison officials who confiscated it improperly and failed to return it after he proved ownership, would not be barred by sovereign immunity.[2] Both in the majority opinion and in Phelps, we have deemed the touchstone of whether sovereign immunity may be successfully pleaded to be a factual determina-

---

2. As an alternative holding, Phelps said that the then Virginia grievance procedure provided a postdeprivation remedy to preclude Phelps' § 1983 claim for damages for temporary deprivation of the use of his television set. Phelps was decided after the decisions of the district court in the instant cases but well before they were reargued in banc.

Phelps was not cited by the Commonwealth as a supplementary authority; and when the court inquired of counsel for the Commonwealth about the scope of relief available under Virginia's grievance procedure, we were told that awards are "a matter of discretion and not a matter of right." We were also told by counsel for plaintiffs that they had unsuccessfullly sought redress for their claims under the Virginia grievance procedure. I would therefore decline to reach the issue of the effect of the Virginia grievance procedure on plaintiffs' right to maintain their actions in the district court.

But even if the Virginia grievance procedure is to be considered, I think that, like the defense of sovereign immunity discussed in the text, the record is not sufficiently complete to hold unconditionally that the grievance procedures provide a postdeprivation remedy in these cases sufficient to foreclose plaintiffs' claims under Parratt. In my view, it is incumbent on the Commonwealth to offer proof demonstrating the availability and the complete efficacy of any postdeprivation remedy relied on to invoke the rule of Parratt. Short of such a showing, any dismissal of plaintiffs' complaints should be a conditional one.

tion of whether the state employee was performing a discretionary or a ministerial act when he gave rise to liability. If discretionary, he is immunized from liability by sovereign immunity; if ministerial, sovereign immunity is not available as a defense to personal liability.

The state precedents cited and discussed in the majority opinion and in Phelps certainly appear to stand for the proposition for which they are cited. There is, however, a later state decision, not mentioned by the majority, which I think at least raises the specter that we may not have correctly discerned the state of Virginia law. The case is Bowers v. Commonwealth of Virginia, Dept. of Highways & Transp., ____ Va. ____, 302 S.E. 2d 511 (1983). That case held that the resident engineer of the highway department was entitled to assert sovereign immunity for his alleged negligence in the construction of a concrete culvert incident to improvement of a state highway. The unsettling aspect of the case is that it appears to scuttle the bright line test that sovereign immunity applies to discretionary acts but is not applicable to ministerial acts. Instead it is but "one of the indicia of entitlement to immunity." 302 S.E.2d at 515. In this regard, as the dissenters in Bowers point out, that decision gives new life to the conflict between two apparently divergent lines of Virginia authority with regard to the availability of sovereign immunity as a defense in a suit against a state employee for his alleged negligence. 302 S.E.2d at 516.

In short, recent developments have rendered the applicable Virginia law difficult if not impossible to predict with certainty.[3] Unfortunately, Virginia is a state that has no mechanism whereby we can certify the question and obtain an authoritative answer. I am persuaded by some of our past unsuccessful efforts to give authoritative and correct answers as to state law that we ought not overlook the possibility that once again we may not have made a correct prediction. We ought to afford plaintiffs some protection from an erroneous determination on our part.

While I would therefore affirm the judgments of the district court, I would require the district court to grant, as a condition of dismissal, leave to plaintiffs to reinstate their cases in the event that sovereign immunity is upheld as a defense to the prosecution in a Virginia court of any claim now pending or hereafter filed arising out of the facts and matters alleged in their complaints under § 1983.[4]

---

3. We had occasion to express this conclusion in Fox v. Custis, 712 F.2d 84, 89 (4 Cir. 1983). Further evidence of the expansion and confusion of Virginia's sovereign immunity defense is the Supreme Court of Virginia's recent decision in Hinchey v. Ogden, ____ Va. ____, 307 S.E. 891 (1983). In Hinchey, the court extended the doctrine to cover, not only actions at law for damages but also, suits in equity to compel or restrain action by government. Id. at 894.

4. This is essentially the course of action recommended in a thoughtful article, see K. Blum, The Implications of Parratt v. Taylor for Section 1983 Litigation, 16 The Urban Lawyer 363, 380-81 (1984).

Judge Phillips and Judge Murnaghan authorize me to say that they concur in this opinion.

84-5872

NO. 84-

Supreme Court, U.S.
FILED
JAN 25 1985
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROY E. DANIELS,
Petitioner,

vs.

ANDREW WILLIAMS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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NO. 84-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROY E. DANIELS,
Petitioner,

vs.

ANDREW WILLIAMS,
Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I, James W. Hopper, hereby certify that on this 24th day of January, 1985, I served by first class mail copies of Andrew Williams' Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit upon counsel for Petitioner, Stephen A. Saltzburg, Esquire, Professor of Law, University of Virginia School of Law, Charlottesville, Virginia 22901.

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QUESTIONS PRESENTED

1. Whether the En Banc Court of Appeals' holding that the Petitioner's Bodily Injury Occasioned by simple negligence is not a liberty interest protected by the due process clause is consistent with this Court's underlying rationale in Parratt v. Taylor.

2. Whether the Court of Appeals unanimous holding that assuming liberty deprivations receive constitutional protection, Parratt v. Taylor is applicable and respondent's suit would be barred under §1983 where the state provides a post-deprivation remedy, is wholly consistent with both Parratt and other circuits as well.

3. Whether the En Banc Court of Appeals' clear holding that a meaningful post-deprivation remedy exists under Virginia law because sovereign immunity is no defense to a claim against a public

official based upon simple negligence in the performance of a ministerial duty is consistent with this Court's holding in Parratt v. Taylor and Hudson v. Palmer.

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REASONS FOR DENYING THE PETITION

I. THE EN BANC COURT OF APPEALS' HOLDING THAT THE PETITIONER'S BODILY INJURY OCCASIONED BY SIMPLE NEGLIGENCE IS NOT A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE IS CONSISTENT WITH THIS COURT'S UNDERLYING RATIONALE IN PARRATT v. TAYLOR.

Parratt v. Taylor, 451 U.S. 527 (1981) decided that a deprivation of property could, under limited circumstances, give rise to a violation of the Fourteenth Amendment. The majority, however, expressed no opinion as to whether this rationale should extend to liberty interests. However, the Court of Appeals has very aptly noted that the Parratt Court "took pains to explicitly disavow construing its decision so that it might result in 'turning every alleged injury which may have been inflicted by a state official acting under 'color of state law' into a violation of the Fourteenth Amendment cognizable under

§1983.'" Daniels v. Williams, No. 82-6538, slip op. at 5 (4th Cir. Nov. 16, 1984)(citing Parratt, 451 U.S. at 544 (1981)).

By limiting Parratt to its factual setting, the Court of Appeals has accomplished the intent set forth in Parratt. The Parratt Court reasoned that, in holding the state officials conduct did not constitute a violation of the Fourteenth Amendment, it was preventing the Fourteenth Amendment from becoming "'a font of tort law to be superimposed upon whatever circumstance may already be administered by the States.' We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." Parratt, 451 U.S. at 544. (citation omitted)

An even stronger argument for limiting Parratt to its facts may be found in the second concurrence. Indeed,

Justices Blackman and White's concurrence in Parratt indicated that liberty interests were to be distinguished from property interests. Justice Blackman wrote that "I do not read the Court's opinion as applicable to a case concerning deprivation of life or liberty." Parratt, 451 U.S. at 545.

A majority of this Court in Logan v. Zimmerman Brush Co., while it could have expanded Parratt, 455 U.S. 422 (1982) cited Justice Blackman's concurrence with approval. Id. at 436. The Logan Court also specifically held that "Parratt was inapplicable to cases involving challenges to 'the state system that destroys a complanant's property interest, by operation of law . . . whether the . . . action is taken through negligence, maliciousness or otherwise.'" Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1982)(citation omitted)(citing Parratt,

451 U.S. at 436).

These two factors led the Fifth Circuit in Brewer v. Blackwell to hold that Parratt should not be extended to liberty interests. The Brewer court held that "given the Court's citation of Justice Blackman's Parratt concurrence and the Court's narrow reading of Parratt in Logan, we decline to give Parratt the sweeping interpretation required to encompass the intentional deprivation of liberty involved in this case. Brewer, 692 F.2d at 395.

This court has had several opportunities to expand the Parratt doctrine to include liberty interests and yet it has refused to do so. Given this and the limiting language of the Parratt opinion itself the Court of Appeals' decision to limit Parratt to property interests is consistent with this Court's intentions.

II. THE COURT OF APPEALS' UNANIMOUS HOLDING THAT ASSUMING LIBERTY DEPRIVATIONS RECEIVE CONSTITUTIONAL PROTECTION, PARRATT v. TAYLOR IS APPLICABLE AND RESPONDENT'S SUIT WOULD BE BARRED UNDER §1983 WHERE THE STATE PROVIDES A POST-DEPRIVATION REMEDY, IS WHOLLY CONSISTENT WITH BOTH PARRATT AND OTHER CIRCUITS AS WELL.

The Court of Appeals' ruled that even if liberty interests were constitutionally protected, the Petitioner's §1983 suit would be barred if there was access to a post-deprivation remedy in the state courts. This rationale is consistent with the expressed intention of the Parratt Court and of other Court's of Appeal.

The Parratt Court indicated that where a deprivation of a constitutional right has been alleged, "[o]ur inquiry . . . must focus on whether the respondent has suffered a deprivation without due process of law. In particular, we must decide whether the tort remedies which the State . . . provides as a means of

redress for property deprivations satisfy the requirements of procedural due process." Parratt, 451 U.S. at 537. Therefore, so long as the state's system for redress meet the requirements of procedural due process, an action under §1983 may not be sustained. This is precisely what the Court of Appeals' has so reasoned in the case at bar.

Although the Fourth Circuit had not, until this case, had occasion to decide this specific issue, other circuits which have held that liberty interests do receive constitutional protection, have ruled that if a post-deprivation means of redress exists then an action under §1983 cannot be sustained. See e.g., Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984); Gilmer v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984); Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982); Rutledge v. Arizona Board of Regents, 660

F.2d 1345 (9th Cir. 1981); Junker v. Tinney, 549 F.Supp. 574 (D. Md. 1982).

The basic underlying rationale for allowing this post-deprivation proceeding is that a pre-deprivation hearing is impractical. Parratt, 451 U.S. at 540. The Parratt Court held that:

> The justification which we have found sufficient to uphold takings of property without any pre-deprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur.

Id. at 541.

In the case at bar, the State certainly has no policy condoning Respondent's acts. They may, looking at them in a light most favorable to the Petitioner, be characterized as random and unauthorized. Given this, allowing post-deprivation remedies to satisfy due

process is consistent with the underlying policy in Parratt.

If this Court should find that liberty interests do receive constitutional protection, certiorari should be denied in any event because the Court of Appeals has correctly ruled that a post-deprivation remedy satisfies due process.

III. THE EN BANC COURT OF APPEALS' CLEAR HOLDING THAT A MEANINGFUL POST-DEPRIVATION REMEDY EXISTS UNDER VIRGINIA LAW BECAUSE SOVEREIGN IMMUNITY IS NO DEFENSE TO A CLAIM AGAINST A PUBLIC OFFICIAL BASED UPON SIMPLE NEGLIGENCE IN THE PERFORMANCE OF A MINISTERIAL DUTY IS CONSISTENT WITH THIS COURT'S HOLDING IN PARRATT v. TAYLOR AND HUDSON v. PALMER.

Respondent is a peculiar breed of official in Virginia's hierarchy. The Respondent is not a state employee. Although the Virginia Supreme Court has yet to decide Respondent's precise relationship with the state, the Fourth

Circuit has held that for Title VII purposes, deputy sheriffs are not employees. See Petska v. T. C. Waddy, Sheriff, No. 82-0327-R (E.D.Va. July 9, 1982). Throughout Petitioner's Brief the Respondent is referred to as either a "state employee", a "state officer" or a "state official". The Respondent cannot be categorized as any of these. The Respondent is a duly appointed deputy of the sheriff. The sheriff is in somewhat of a paradoxical position as compared to traditional "state employees", "state officers", or "state officials". In one sense, he is regarded as an Officer of the Commonwealth of Virginia, Article VII, Section 4, Constitution of Virginia (1971), and his position has been so characterized by the Supreme Court of Virginia. As a constitutional officer, the Sheriff's "duties are regulated and defined by [State] statute," and not by

any county or municipality. Hilton v. Amburgey, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957). On the other hand, the Sheriff may be regarded as an official of one of the Commonwealth's political subdivisions because the Sheriff is elected by the qualified voters of the county or municipality. The Sheriff's duties require wide latitude, however, and neither the Commonwealth nor the political subdivision has absolute control over his everyday operations. As a constitutional officer, the sheriff serves independent of the municipal or county government and independent of the state government. See Demier v. Arlington County, No. 80-1086-A, at 5 (E.D. Va. May 12, 1981). "[N]either the City of Richmond or the Commonwealth of Virginia is responsible for the actions of the Richmond Sheriff's Department, nor does the City or the State have any

control over the actions of the Sheriff of the City of Richmond." Sherman v. City of Richmond, 543 F.Supp. 447, 449 (E.D. Va. 1982)(interpreting the law of the Commonwealth).

The Sheriff is authorized and empowered to appoint deputies to assist him in the performance of his official duties. Those deputies are appointed pursuant to Virginia Code §15.1-48. The Respondent is such a deputy. Therefore, while the Respondent might be categorized as a deputy of a wholly local official elected by the qualified voters of the community, the duties of his principal are governed by state statute.

Petitioner contends that because the doctrine of sovereign immunity may apply, he will be cut off from a post-deprivation remedy. This occurence will in turn, he contends, cause Parratt v. Taylor to become an empty concept. In

this case, these arguments by Petitioner are not valid.

This Court recently decided a similar case deriving from the Fourth Circuit, Hudson v. Palmer, 104 S.Ct. 3194 (1984). In a similar cause of action the Complainant in Hudson likewise claimed that because "relief under applicable state law is far from certain and complete, the state court might hold that petitioner . . . is entitled to sovereign immunity." Id. at 3205 (citation omitted)(emphasis added). The Hudson Court found this argument "unconvincing". The Court noted that "[t]he District Court and the Court of Appeals held that respondent's claim would not be barred by sovereign immunity." Id. In the case at bar, the District Court, the Court of Appeals' Panel and the Court of Appeals sitting en banc held that the doctrine of sovereign immunity would not apply and

that, therefore, Petitioner would have access to a meaningful post-deprivation remedy.

Although Hudson v. Palmer involved an intentional tort for which the Virginia Supreme Court has given specific guidance regarding sovereign immunity, it is clear that where a negligent act is involved, the doctrine of sovereign immunity may still not apply.[1]

The Virginia Supreme Court in First Virginia Bank v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983) held that if an act or omission of simple negligence is committed in the performance of a ministerial task, sovereign immunity will not be a shield to a subsequent cause of action.

The defendant in First Virginia Bank

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[1]For an overview of the status of Virginia's doctrine of sovereign immunity see, Messina v. Burden, ___ Va. ___, 321 S.E.2d 657 (1984) (Va. Oct. 12, 1984); James v. Jane, 221 Va. 43, 267 S.E.2d 108 (1980).

was a clerk of the circuit court who was a constitutional officer of the Commonwealth of Virginia. The clerk had been sued because of the actions of one of the deputies in her office. The deputy clerk in First Virginia Bank, like the Respondent in the case at hand, was a deputy of a constitutional officer. Both the clerk of the court and the office of sheriff derive their authority from state statute. The Court of Appeals found "no significant difference in the duties of the deputy sheriff in this case, . . . and the deputy clerk of the court in Baker." Daniels v. Williams, No. 82-6538 slip op. at 9. In any case the Court of Appeals found that sheriff's and their deputies were held to a standard of ordinary care. Id. at 9 n.5.

In this case, in three separate proceedings, the District Court, the Court of Appeals' Panel and the Court of

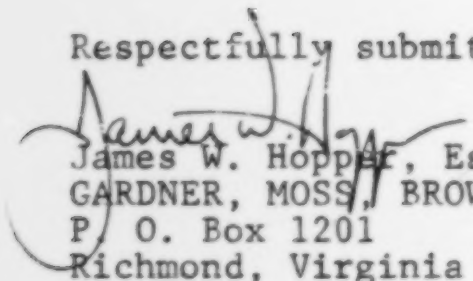
Appeals en banc have ruled that the doctrine of sovereign immunity would not be a bar to a state cause of action. Given this definitive ruling, it cannot be more clear that Petitioner has access to a post-deprivation remedy. This clarity underlies this Court's opinion in Hudson v. Palmer.

CONCLUSION

Because Respondent believes that the Court of Appeals' holding -- that Respondent's bodily injuries did not give rise to a constitutional deprivation and because assuming arguendo that these injuries did give rise to a constitutional deprivation Respondent is afforded adequate remedy in state courts -- is consistent with prior decisions of this Court, he respectively asks this Court to deny a Writ of Certiorari to the United

States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROY E. DANIELS,
Petitioner

vs.

ANDREW WILLIAMS,
Respondent

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITIONER'S REPLY BRIEF

Petitioner believes that the questions presented in his petition for certiorari require no elaboration in light of the brief in opposition filed by the respondent. But, petitioner does wish to call to the Court's attention several significant aspects of the brief in opposition and one recent en banc decision that was handed down after the petition for certiorari was filed in this case.

The brief in opposition highlights the need for this Court to clarify the scope of its decision in Parratt v. Taylor, 451 U.S. 527 (1981). Petitioner argues, as did the dissenting opinion in the court of appeals, that each of the opinions in Parratt appeared to assume that liberty interests were protected by the Constitution and that this Court simply did not reach the question whether a post-deprivation remedy was adequate to protect liberty as well as property interests. The majority of the court of appeals, taking a position rejected by all other courts of appeals, read the Court's opinions as suggesting that liberty interests are to receive less protection than property interests. That is the position that respondent supports in its brief in opposition.

Not only is the conflict between the Fourth Circuit and all other circuits dramatic, but it is a conflict that places liberty, and perhaps even life, in an unprotected status under federal law. Now that the court of appeals has announced that a state has no constitutional duty to protect liberty (and presumably life), states may take the court at its word and

provide no protection for the people whom it imprisons. Certainly, the idea that a state may completely disregard the integrity of the people upon whom it imposes custody so long as it protects their hobby kits is novel. The court of appeals and the respondent say that the idea is not theirs, but this Court's. Petitioner asks this Court to clarify Parratt and reject the conception of protected rights that the court of appeals and respondent have articulated as the product of this Court's decisions.

In deciding whether to grant review, the Court might wish to observe that respondent argues in its brief that the Fifth Circuit, like the Fourth, finds that Parratt does not apply to liberty interests. The fact is, however, that the Fifth Circuit's decisions hold that liberty interests may require more, not less, protection than property interests. That is the thrust of Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1981), which respondent cites. Respondent appears to be confused not only by Parratt but also by lower court interpretations of that decision. Respondent is not alone. The conflicts among the lower courts are cited in the petition in this case. The need for a uniform, understandable approach could not be greater.

Petitioner also calls the Court's attention to a recent en banc decision of the Third Circuit, Davidson v. O'Lone, No. 82-6743, December 27, 1984, which reaches the opposite conclusion from the Fourth Circuit. The Third Circuit plainly states that liberty interests are protected. Slip Opinion, at 10. A copy of the slip opinion is attached as an Appendix to this reply.

The petition for certiorari in this case cited numerous lower court opinions that struggle to decide whether, if a prisoner's liberty interests are protected by the Fourteenth Amendment, a post-deprivation hearing of the type approved in Parratt is adequate to satisfy the due process clause of the Amendment. Respondent does not suggest to the Court that the cases are uniform. Rather, he argues that the court of appeals was correct in its interpretation of Parratt. Even if the court of appeals was correct, the fact remains that lower courts need guidance on the meaning of Parratt, and only this Court can provide that guidance.

Finally, petitioner respectfully calls to the Court's attention a misstatement of fact in the brief in opposition. After the respondent claims to be a peculiar type of state officer (although it is clear that respondent does not purport to argue that his conduct is not state action), he misstates to the Court that the district court, the court of appeals' panel and the en banc court of appeals have held that sovereign immunity would not bar petitioner's suit in a state court. This statement is false in every respect. The district court cited Parratt but did not even mention the possibility that a sovereign immunity claim might bar a recovery in state court. (Its order is found in Appendix III to the petition for certiorari.)

The panel of the court of appeals recognized that the petitioner might well be barred from a state court recovery because of the sovereign immunity doctrine. (Appendix II to Petition, at page 5). The en banc court specifically did not decide whether immunity would bar a recovery in state court.

(Appendix I to Petition, at 9). Moreover, three dissenting judges found no adequate state court remedy. The misstatement by respondent is startling in view of the fact that the court of appeals asked during oral argument en banc whether the respondent would give up a sovereign immunity defense, and the respondent specifically refused. (Appendix IV to Petition, at 10, n. 1). Since the Attorney-General of Virginia appeared on the brief for respondent in the court of appeals, it is apparent that the state's chief law enforcement officer believes that sovereign immunity is a viable defense on respondent's behalf.

It is beyond argument, therefore, that the court of appeals held that even if sovereign immunity would bar an action, the existence of a broad sovereign immunity defense would not be inconsistent with the meaningful state court remedy required under Parratt. The conflict among lower courts, pointed out in the petition, has been exacerbated with the Third Circuit's decision in Davidson v. O'Lone, supra. The en banc Third Circuit held that a sovereign immunity bar to a state court recovery was a denial of a meaningful state court remedy. (Slip Opinion, at 11.) In fact, all the judges on the Third Circuit, with the exception of Judges Garth and Weis (who filed a concurring opinion) agreed on the holding.

This Court implied in Hudson v. Palmer, 104 S. Ct. 3194 (1984), by its examination of sovereign immunity law that too broad an immunity might be inconsistent with Parratt. With the lower courts in conflict, Hudson as well as Parratt is in need of clarification.

For these reasons, as well as those advanced in his petition, the petitioner asks this Court to grant certiorari in his case.

Respectfully submitted,

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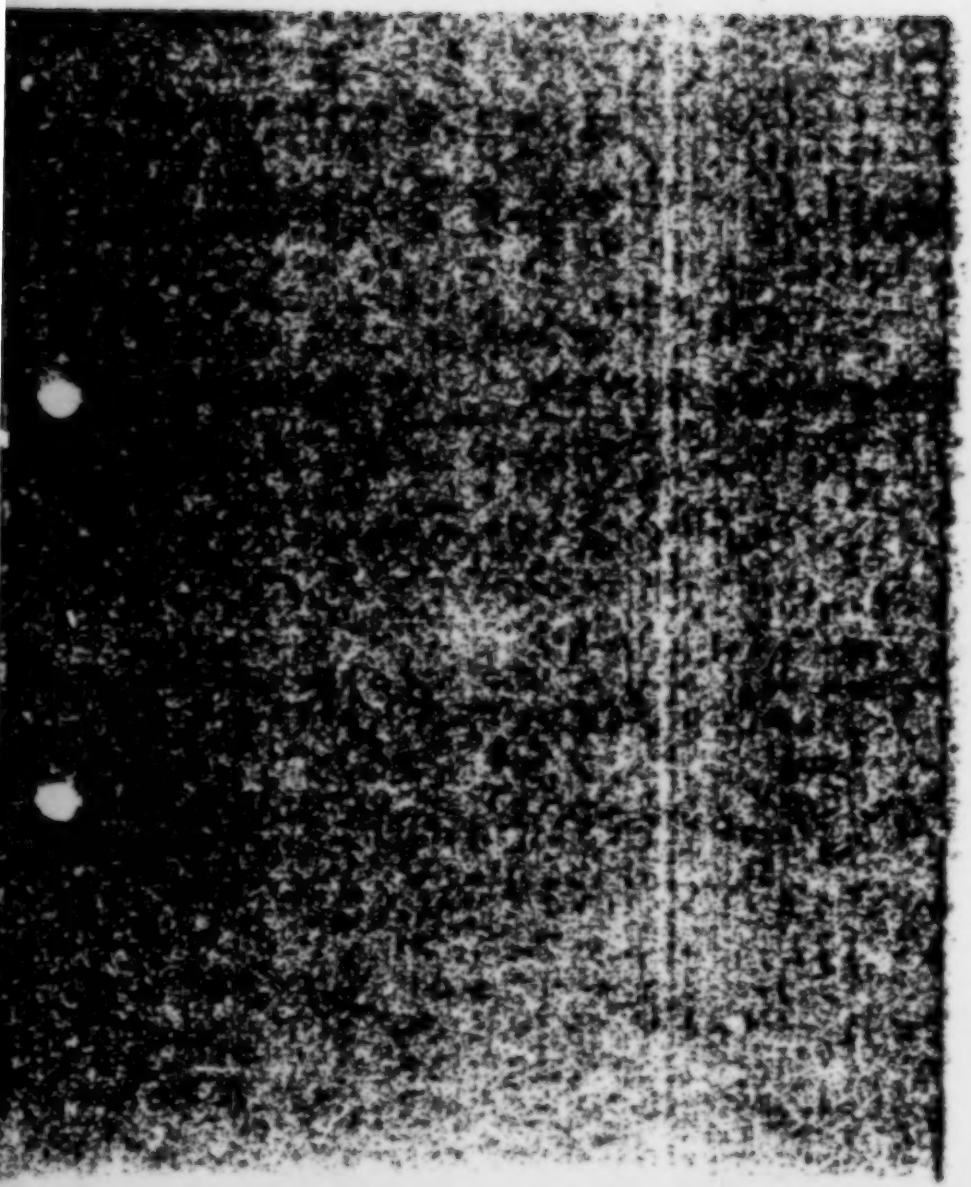

APPENDIX TO PETITIONER'S REPLY TO BRIEF IN OPPOSITION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5743

ROBERT DAVIDSON

v.

EDWARD O'LO[illegible], Superintendent,
ARTHUR JON[illegible], Hearing Officer,
JOSEPH CANNON, Superintendent, and
ROBERT JAMES, Internal Affairs

JOSEPH CANNON and ROBERT JAMES,
Appellants

Appeal from the United States
District Court for the
District of New Jersey (Camden)

(D. C. Civil No. 81-253)

Originally Argued December 1, 1983

Before: GIBBONS and SLOVITER, *Circuit Judges*,
and GREEN, *District Judge**

Reargued In Banc May 7, 1984

Before: ALDISERT, *Chief Judge***, SEITZ, GIBBONS,
HUNTER, WEIS, GARTH, HIGGINBOTHAM,
SLOVITER and BECKER, *Circuit Judges*

(Opinion filed December 27, 1984)

---

* Hon. Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation

** At the time of the reargument in banc, Judge Seitz was Chief Judge.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The principal issue presented by this appeal is whether 42 U.S.C. § 1983 encompasses a claim for personal injury to a state prisoner based on the negligence of prison officials when New Jersey state law provides no remedy.[1]

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1. This appeal was originally heard by a panel of this court and then reheard by the court in banc pursuant to Chapter IX.A. of the Internal Operating Procedures of this court.

I.

Plaintiff Robert Davidson was an inmate at Leesburg State Prison when, on December 17, 1980, he intervened in a fight between two other inmates, Gibbs and McMillian. The three had disciplinary hearings on the morning of December 19, and immediately afterward McMillian threatened Davidson. Davidson returned to the hearing room to report the incident and, at the request of the guard on duty, wrote a note intended for Arthur Jones, the hearing officer. The note said:

> When I went back to the unit after seeing you McMillian was on the steps outside the unit. When I was going past him he told me "I'll fuck you up you old mother-fucking fag." Go up to your cell, I be right there.
>
> I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so "if" anything develops you would be aware.
>
> I'm quite content to let this matter drop but evidently McMillian isn't.
>
> Thank you, R. Davidson

Da14.

Jones, to whom the note was addressed, was a civilian and not part of the prison administration. He told the guard, Jose Garcia, to pass the note to the proper officials. At 11:40 a.m. Garcia delivered it to Joseph Cannon, assistant superintendent of the prison. Cannon read it and told Garcia to give it to Corrections Sergeant Robert James. Cannon testified later that he did not regard the situation as urgent because Davidson, whom he had known for years, did not contact him directly, as he had previously done in various situations.

Sergeant James was not in his office, and Garcia did not get the note to him until after 2:00 p.m. Garcia told him then that the note reported a threat by McMillian against Davidson. James attended to other matters, which he described as emergencies, leaving the note on his desk. At 4:00 he started a second shift, as Assistant Center Keeper, in another part of the prison. Between the time he received the note and the time he left the prison that night, James spent only about 10 minutes in his office. He forgot about the note, which he had not read. James acknowledged that in such a situation he would ordinarily interview the inmates. Though he was not able to attend to the matter that day, he testified that if he had remembered the note he would have posted it at the Center to alert officers on the morning shift.

Davidson, as the parties have stipulated, took no other steps to notify the authorities or request protective custody. He testified that he did not foresee the attack, but wrote the note to exonerate himself in the event that McMillian started another fight. Davidson also testified that he wanted officials to reprimand McMillian.

Neither Cannon nor James worked on December 20 or 21. On December 21, McMillian attacked Davidson with a fork, inflicting wounds to his face, neck, head and body, and breaking his nose. Though the stab wounds healed within several weeks, Davidson has undergone surgery to correct problems stemming from his broken nose, suffering continuing pain and residual effects.

Davidson was foreclosed from recovery from these defendants for his injuries under state law, for the New Jersey Tort Claims Act provides that "[n]either a public entity nor a public employee is liable for . . . any injury caused by . . . a prisoner to any other prisoner." N.J. Stat. Ann. § 59:5-2(b)(4) (West 1982). The parties agree that as a result of this provision, Davidson has no state law claim for his injuries against the defendants or against the state.

Davidson brought suit in the United States District Court for the District of New Jersey under 42 U.S.C. § 1983, naming as defendants Cannon, James, Jones, and Edward O'Lone, the prison superintendent. The court granted summary judgment in favor of O'Lone. The case against the other three was tried with Davidson appearing *pro se*. The court concluded that plaintiff did not establish an Eighth Amendment violation "because defendants did not act with deliberate or callous indifference to plaintiff's needs and because the incident complained of was a single attack." Da18. The court concluded, however, that Cannon and James, but not Jones, negligently failed to take reasonable steps to protect Davidson, that Davidson was injured as a result, and that their negligence deprived Davidson of a constitutionally protected liberty interest in freedom from assault while in prison. The court reasoned that because the New Jersey immunity provision denied Davidson a hearing, Davidson had been deprived of his liberty interest without due process. Davidson was awarded compensatory damages of $2,000.

Defendants appeal, contending that the district court erred in concluding that they were negligent, that the court erred in concluding that an inmate such as Davidson in a state prison has a liberty interest in being protected by prison officials from a single assault by another inmate, and that the court erred in concluding that 42 U.S.C. § 1983 encompasses a claim arising out of a negligent failure by prison officials to protect an inmate against a single assault by another inmate. We will consider these contentions seriatim.

II.

After hearing all of the relevant evidence, the district court concluded, with respect to Cannon and James:

> We find that these two defendants negligently failed to take reasonable steps to protect plaintiff, and that he was injured as a result. Both of these officials had the responsibility to care for plaintiff's safety, actual notice of the threat by an inmate with a known history of violence, and an opportunity to prevent harm to plaintiff.

Da18.

Appellants concede that the applicable standard by which we must review the findings of the district court when sitting without a jury is the "clearly erroneous" standard contained in Rule 52(a) of the Federal Rules of Civil Procedure. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). Appellants thus bear the heavy burden of convincing us that the district court determination either "is completely devoid of minimum evidentiary support displaying some hue of credibility," or "bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972).

The appropriate standard of care owed by prison custodians in New Jersey with respect to the risk of inmate injury was set forth in *Harris v. State*, 61 N.J. 585, 297 A.2d 561 (1972). As the court stated there, a prisoner is owed "a duty of due care while in custody" and further, "in appropriate circumstances [the prisoner] would be entitled to a recovery on a showing that a prison official negligently failed to discharge his responsibility for the [prisoner's] care with resulting injuries to him." *Id.* at 590, 297 A.2d at 563. The

Harris court denied recovery because the defendants had received no warning of a danger to the plaintiff. In this case, the district court found that the defendants had "actual notice of the threat by an inmate with a known history of violence," Da18, which we find satisfies the *Harris* notice requirement. *See also* Restatement (Second) of Torts § 320 (1965).

Appellants challenge the district court findings as clearly erroneous on several grounds. They contend that the district court erred in finding that they knew about McMillian's past, that they failed to exercise reasonable care to protect Davidson, and that their failure to follow the prison procedures proximately caused the injury. However, while we agree that on this record there would be room for the trier of fact to have reached a different conclusion as to negligence, we cannot hold that there was no negligence as a matter of law nor that we are "left with the definite and firm conviction that a mistake has been committed" by the district court in reaching its findings. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Thus we accept the determination that defendants were negligent in failing to take steps to prevent McMillian's assault on Davidson.

III.

Appellants argue that the district court erred as a matter of law when it identified a "liberty interest" protected by the Due Process Clause to be free from physical attack and injury. Since § 1983, by its own terms, provides redress only when state employees infringe those rights "secured by the Constitution and laws" of the United States, *see, e.g., Paul v. Davis*, 424 U.S. 693, 700-01 (1976); *Smith v. Spina*, 477 F.2d 1140, 1143 (3d Cir. 1973), plaintiff must satisfy this threshold requirement before we need reach the question whether simple negligence can give rise to

§ 1983 liability. *See Baker v. McCollan*, 443 U.S. 137, 140 (1979). We must, therefore, decide whether plaintiff as a state prisoner had a constitutionally protected "liberty interest" in security from physical assault by fellow prisoners.

The constitutional right on which Davidson relies is that of his liberty interest in personal security protected by the Fourteenth Amendment. That the amendment covers such a basic personal right was affirmed by the Supreme Court in *Ingraham v. Wright*, 430 U.S. 651, 673 (1977), where it stated, "Among the historic liberties [protected by the due process clause] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."

Davidson's status as a prisoner does not deprive him of his right to rely on the Fourteenth Amendment. Because an inmate is not free to leave the confines which s/he is forced to share with other prisoners, the state bears the responsibility for the inmate's safety. Undoubtedly, a similar responsibility stemming from the state's control over the plaintiff underlay the Court's finding of a liberty interest in *Ingraham*, where the plaintiff was in a public school, in *Romeo v. Youngberg*, 457 U.S. 307 (1982), where the plaintiff was an inmate of a state institution for the mentally retarded, and in *City of Revere v. Massachusetts General Hospital*, 103 S. Ct. 2979, 2983 (1983), where the plaintiff was injured while being apprehended by the police. The Supreme Court has "repeatedly held that prisons are not beyond the reach of the Constitution." *Hudson v. Palmer*, 52 U.S.L.W. 5052, 5053 (July 3, 1984). As it recently stated, "[W]e have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Id.*

This court held in *Curtis v. Everette*, 489 F.2d 516, 518 (1973), *cert. denied*, 416 U.S. 995 (1974), that the Due Process Clause is a valid basis for a prisoner's § 1983 action seeking relief for injuries inflicted by another prisoner.[2] In *Curtis*, the allegations that defendant prison officials stopped the plaintiff prisoner from defending himself from an attack by another prisoner were held to implicate the plaintiff's constitutional "right to be secure in his person" under the Fourteenth Amendment. *Id.*

Appellants argue that the substantive due process right to personal security does not protect a state prisoner from an isolated attack by another prisoner. In so arguing, appellants have contracted into one issue what are in fact two separate issues, whether the liberty interest in bodily integrity protected by the Fourteenth Amendment covers the state's failure to prevent attacks by other prisoners and the circumstances under which § 1983 provides a remedy for deprivation of that interest. Our focus in this section is directed only to the Fourteenth Amendment liberty interest.

As to that, we find no Supreme Court precedent that would limit the protected liberty interest in freedom from attack to those attacks inflicted by the

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2. Other courts have treated a prisoner's § 1983 claim against prison officials for failure to protect against unjustified intrusions on personal security as raising an Eighth Amendment claim. *See, e.g.*, Wade v. Haynes, 663 F.2d 778, 781 (8th Cir. 1981) *aff'd on other grounds sub nom.* Smith v. Wade, 103 S. Ct. 1625 (1983); Withers v. Levine, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); Clapper v. Flynn, 605 F.2d 519 (10th Cir. 1979); Parker v. McKeithen, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974). Nothing in these opinions, however, signifies rejection of such a claim premised upon the Fourteenth Amendment. In Holmes v. Goldin, 615 F.2d 83 (2d Cir. 1980), the court accepted a claim predicated on both bases.

state officials themselves. Certainly it would be absurd to argue that a state prisoner does not have a liberty interest that would be infringed were his or her state custodian deliberately to open the prison door knowing that a lynch mob converged outside. The state infringement would be as direct as if the prison guard had tied the rope around the prisoner's neck. The fact that there was only a single or isolated episode is irrelevant in determining whether a liberty interest was implicated.

That such a liberty interest covers attacks committed by persons other than state custodians has been recently affirmed in *Youngberg v. Romeo*, 457 U.S. 307 (1982). Romeo, an involuntarily committed resident of a state institution for the mentally retarded, claimed in his § 1983 suit against administrators of the institution that his substantive right, *inter alia*, to safe conditions of confinement protected by the due process clause of the Fourteenth Amendment was violated because state officials were aware of and failed to take all reasonable steps to prevent his injury by other residents and by his own violence. The Court expressly recognized and reaffirmed the substantive liberty interest under the Fourteenth Amendment implicated by this claim. The Court stated:

> In the past, this Court has noted that the right to personal security constitutes a "historic liberty interest" protected substantively by the Due Process Clause. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). And that right is not extinguished by lawful confinement, even for penal purposes. *See Hutto v. Finney*, 437 U.S. 678 (1978).

Id. at 315. Thus we reject appellants' contention that Davidson had no interest protected by the Constitution.

IV.

The reasoning by which the district court concluded that Davidson was entitled to recover in this § 1983 action against Cannon and James is as follows: Cannon and Jones were negligent; as a result of that negligence, Davidson was injured; freedom from bodily injury is a liberty interest which is protected by the Fourteenth Amendment of the Constitution; New Jersey does not provide prisoners, such as Davidson, with a remedy in state court because it immunizes its employees against claims for injuries to a prisoner caused by another prisoner; ergo Davidson can recover under § 1983. We have noted our agreement with the district court's reasoning up to the step at which it concluded that § 1983 liability extends to the negligent conduct of the prison officials in failing to investigate or take other action to protect Davidson.[3] We turn now to that question, denominated as "elusive" by the Supreme Court. *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

There are literally hundreds of cases in the Courts of Appeals in which various aspects of this issue have arisen and no clearly discernible thread has evolved. As

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3. An enigmatic footnote in Baker v. McCollan, 443 U.S. 137, 140 n.1 (1979), appears to distinguish between the question of defendant's state of mind as bearing on "whether a constitutional violation has occurred in the first place" and "whether § 1983 contains some additional qualification of that nature." Subsequent commentary has drawn a substantive distinction between the two questions. *See, e.g.*, S. Nahmod, Civil Rights & Civil Liberties Litigation § 3.02 (Supp. 1983). However, in earlier cases, the Court treated the scope of § 1983 and the Fourteenth Amendment correlatively. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 699 (1976). For purposes of this case, the questions whether negligent conduct by state officials is a deprivation of Fourteenth Amendment rights and whether it can be redressed by suit under § 1983 appear to be mirror images of each other.

the Supreme Court has recognized, "The diversity in approaches [among the various federal courts] is legion." *Parratt v. Taylor*, 451 U.S. 527, 533 (1981).[4] We begin, therefore, by examining the Supreme Court's own treatment of the issue.

Until the Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), there was little case law dealing with violations of § 1983 since most of the civil rights litigation against state officers before that time involved 18 U.S.C. § 242, the criminal counterpart to § 1983. In *Monroe v. Pape*, the Court held, *inter alia*, that because § 1983, unlike § 242, does not contain the word "willfully," proof of "willfulness" should not be required of a plaintiff seeking recovery under § 1983. The Court defined "willfully" as the doing of an act with "a specific intent to deprive a person of a federal right." *Id.* at 187. Justice Harlan, who concurred, addressed the relationship between the state action encompassed in § 1983 and that covered under ordinary state tort law. He stated that one must attribute "to the enacting legislature the view that a deprivation of a constitutional right is *significantly different from and more serious than a violation of a state right* and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Id.* at 196 (emphasis added).

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4. The academic commentary has also been distinguished by its diversity of opinion. *See, e.g.*, Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-Of-Mind Requirement*, 46 U. Cin. L. Rev. 45 (1977); McClellan & Northcross, *Remedies and Damages for Violation of Constitutional Rights*, 18 Duq. L. Rev. 609 (1980); Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5 (1980); Note, *Basis of Liability in a Section 1983 Suit: When is the State-Of-Mind Analysis Relevant?*, 57 Ind. L.J. 459 (1982); Note, *Section 1983 Liability for Negligence*, 58 Neb. L. Rev. 271 (1978); Note, *A Theory of Negligence for Constitutional Torts*, 92 Yale L.J. 683 (1983).

The language and some of the holdings of the subsequent Supreme Court cases considering this issue reflect the Court's rejection of the notion that every state tort committed by a state officer acting under color of state law is *ipso facto* converted into a violation of § 1983. Thus, for example, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court held that a state prisoner subjected to medical malpractice does not automatically have a claim under § 1983. The Court stated, "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106.

In a case decided earlier that year, *Paul v. Davis*, 424 U.S. 693 (1976), the Court, speaking through Justice Rehnquist, held that a citizen defamed by police through circulation of a flyer of "active shoplifters" on which his name and photograph appeared did not state a claim for relief under § 1983 and the Fourteenth Amendment. The Court expressly rejected the premise that "the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims." *Id.* at 699. Justice Rehnquist stated that such a premise "would be contrary to pronouncements in our cases on more than one occasion with respect to the scope of § 1983 and of the Fourteenth Amendment." *Id.*

The authority on which Justice Rehnquist relied was *Screws v. United States*, 325 U.S. 91 (1945), where Justice Douglas had written for the plurality:

> Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even

> murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.

Id. at 108-09, quoted in *Paul v. Davis*, 424 U.S. at 700. Justice Douglas' opinion in *Screws* continued with the caution that Congress should *not* be understood to have attempted

> to make all torts of state officials federal crimes. It brought within [the criminal provision] only specified acts done 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

325 U.S. at 109, also quoted in *Paul v. Davis*, 424 U.S. at 700. Although Justice Douglas in *Screws* was construing the criminal analogue to § 1983, these passages of the *Screws* opinion were used as applicable authority by the majority in *Paul v. Davis* in its interpretation of § 1983. Indeed, Justice Rehnquist then proceeded to apply the analysis from *Screws* to reject the claim that defamation by the police fell within the scope of § 1983 and of the Fourteenth Amendment. Justice Rehnquist wrote:

> [Plaintiff] apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront

> any attempt to derive from congressional civil rights statutes a body of general federal tort law. *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971); *a fortiori*, the procedural guarantees of the Due Process Clause cannot be the source for such law.

Paul v. Davis, 424 U.S. at 701.

Shortly thereafter, in *Procunier v. Navarette*, 434 U.S. 555 (1978), the Supreme Court appeared ready to decide directly the issue before us since it granted certiorari to consider "[w]hether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983." *Id.* at 559 n.6. Because the Court decided that the defendants were entitled to prevail on the defense of qualified immunity as a matter of law, it did not reach the question on which certiorari was granted.

Thereafter, in *Baker v. McCollan*, 443 U.S. 137 (1979), the Court again confronted this question. Again, the Court disposed of the case on other grounds since it held that no constitutional *right* was implicated because the defendant police officer charged with false imprisonment under § 1983 had acted on the basis of a valid arrest warrant. However, in his discussion concerning whether negligent conduct can form the basis of an award of damages under 42 U.S.C. § 1983, Justice Rehnquist, once more writing for the Court, stated:

> Having been around this track once before in *Procunier*, *supra*, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across

> the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action.

Id. at 139-40.

The duty upon which liability was sought to be predicated in *Baker v. McCollan* was closely akin to that Davidson relies on here. Plaintiff McCollan had been falsely imprisoned because his brother, the real culprit, had used plaintiff's driver's license as his identification. The Court of Appeals held that plaintiff's complaint stated a claim for relief under § 1983 because under tort law "the sheriff or arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or a similar name. *See* Restatement (2d) Torts § 125, comment (d) (1965)." *McCollan v. Tate*, 575 F.2d 509, 513 (5th Cir. 1978). Thus in *McCollan*, as in this case, plaintiff's claim was based on obligations under tort law of those state officials who have custody of prisoners.

The Supreme Court, in reversing the Court of Appeals decision, rejected the contention that the duty imposed by tort law would be automatically transmuted into a duty protected by the Constitution. Justice Rehnquist stated:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), false imprisonment does not become a violation of the

> Fourteenth Amendment merely because the defendant is a state official.

Id. at 146.

Thus, nothing in the Court's cases through 1979 provides any support for the principle that negligent conduct by a state official causing injury to the person constitutes a deprivation of a Fourteenth Amendment right which can be redressed in a § 1983 suit. As authority for that position, the district court read the Supreme Court's opinion in *Parratt v. Taylor*, 451 U.S. 527 (1981), as holding "that a state official's negligence is sufficient to constitute a 'deprivation' for due process purposes." Da20. We turn to *Parratt* to determine if it supports the broad construction given it by the district court.

In *Parratt* the plaintiff prisoner brought an action claiming that his now famous hobby materials valued at $23.50 were negligently lost by prison officials in violation of his right under the Fourteenth Amendment not to have his property taken without due process of law. Plaintiff's claim was ultimately rejected by the Supreme Court, which held that because there were state remedies that could have fully compensated plaintiff for the property loss he suffered, the requirements of due process had been satisfied. 451 U.S. at 537-44. Recently, in *Hudson v. Palmer*, 104 S. Ct. 3194 (1984), the Court extended the *Parratt* holding to apply as well to certain intentional deprivations of a prisoner's property. It stated,

> [W]e hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy is available. For intentional, as for negligent deprivations of

> property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.

Id. at 3204. (emphasis added).

The holdings of *Parratt* and *Hudson* that the available state postdeprivation remedies provide adequate procedural due process do not meet the substantive due process issue presented in this case. However, in *Parratt*, before reaching the procedural due process issue Justice Rehnquist, writing for the Court, considered the scope of § 1983, and wrote:

> Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker v. McCollan* [443 U.S. 137 (1979)], we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983 . . . . Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement. The Court recognized as much in *Monroe v. Pape*, 365 U.S. 167 (1961) . . . .
>
> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind.

451 U.S. at 534-35 (footnote omitted).

Admittedly, this language standing alone is susceptible of the interpretation placed upon it by the district court that mere negligence can constitute a deprivation that can be redressed by a § 1983 action. However, in the context of the development of the law set forth above, we conclude *Parratt* does not so hold.

Most significant is that in the two earlier cases also authored by Justice Rehnquist, *Baker v. McCollan*, decided only two years before *Parratt*, and *Paul v. Davis*, the Court vigorously rejected the suggestion that traditional torts became constitutional violations when committed by state officials. It is implausible that the Court would make a major pronouncement that constituted a 180 degree turnabout as to the scope of substantive due process or § 1983 without discussion or analysis. This is particularly so because early in the *Parratt* opinion the Court specifically noted that it had "twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532 (citing *Procunier v. Navarette*, 434 U.S. 555 (1978) and *Baker v. McCollan*, 443 U.S. 137 (1979)) and stated that "in each of those [the Court] found it unnecessary to decide the issue." *Id.* Had the Court intended to finally decide the issue in *Parratt* that it had expressly left open previously, it is reasonable to expect that it would have done so affirmatively.

Instead, what the Court did was reiterate the statements in *Monroe v. Pape* and *Baker v. McCollan* that § 1983 was not limited to intentional deprivation of constitutional rights. That proposition is not the obverse of one stating that § 1983 encompasses suits for negligence by state officials, because there is a broad range of actions between the two poles. Indeed, Justice Powell, concurring in the result in *Parratt*, observed that the Court "passe[d] over the threshold question -- whether a negligent act by a state official . . . constitutes a deprivation of property for *due process* purposes." *Id.* at 547. Thus, nothing in the Court's opinion in *Parratt* leads us to conclude that the Court

held that merely negligent conduct by state officers constitutes a constitutional deprivation encompassed by § 1983.

Of course, the absence of any conclusive Supreme Court holding that requires us to construe § 1983 as encompassing all claims for negligence does not necessarily foreclose that interpretation. However, our own court's opinions, as well as precedent from other circuits that we find persuasive, have concluded that negligence claims are not encompassed within § 1983. We reaffirm that conclusion, in large measure because of what we view as the purpose and essence of § 1983.[5]

The essential element of a § 1983 action is abuse by a state official of his or her official position. *Monroe v. Pape*, 365 U.S. at 172. Justice Brennan has emphasized that "Section 1983 focuses on '[m]isuse' of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Paul v. Davis*, 424 U.S. at 717 (dissenting opinion) (emphasis in original)

5. The Civil Rights Acts of 1870 and 1871, codified today as 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 were enacted to enforce the newly ratified Civil War Amendments in the hostile southern states. As Justice Harlan said in his dissent in the Civil Rights Cases, 109 U.S. 3, 44 (1883), the pervading purpose of those amendments was to secure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him" (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872)). Section 1983 originated as § 1 of the Act of April 20, 1871, 17 Stat. 13, and "was passed by a Congress that had the Klan 'particularly in mind.'" *Monroe v. Pape*, 365 U.S. at 174 (quoting Randall, The Civil War and Reconstruction, 857 (1937)). Referring frequently to a 600-page report documenting outrages against blacks that had gone unpunished, the 42d Congress sought a remedy "against those who represented a State in some capacity were unable or unwilling to enforce a state law." *Id.* at 176 (Court's emphasis).

(quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

In *Kent v. Pease*, 395 F.2d 406 (3d Cir. 1967) (approvingly discussed by Justice Powell in his separate opinion in *Parratt*, 451 U.S. at 550-51), we held that a tort committed by a state official acting under color of state law is not, in and of itself, sufficient to show an invasion of a person's constitutional rights under § 1983. That position was reiterated in a subsequent series of cases. *See Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981), *cert. denied*, 455 U.S. 1109 (1982); *Smith v. Spina*, 477 F.2d 1140, 1143 (3d Cir. 1973); *Howell v. Cataldi*, 464 F.2d 272, 277 (3d Cir. 1972); *Nettles v. Rundle*, 453 F.2d 889 (3d Cir. 1971). As we said in *Rhodes v. Robinson*, 612 F.2d 766, 772 (3d Cir. 1979), "Where a person suffers injury as an incidental and unintended consequence of official actions, the *abuse of power* contemplated in the due process and [eighth] amendment cases does not arise."[6]

Various other courts since *Parratt* have also agreed that simple negligence does not suffice to state a claim under § 1983. *See Hull v. City of Duncanville*, 678 F.2d 582, 584 & n.2 (5th Cir. 1982) (construing *Parratt*); *Mills v. Smith*, 656 F.2d 337, 340 n.2 (8th Cir. 1981) (*per curiam*) (construing *Parratt*). *But see Howard v. Fortenberry*, 723 F.2d 1206, 1209 n.6 (5th Cir. 1984); *McKay v. Hammock*, 730 F.2d 1367, 1373 (10th Cir. 1984).

6. As our analysis of *Parratt* shows, the statement in *Holman v. Hilton*, 712 F.2d 854 (3d Cir. 1983), reading *Parratt* as holding "as a general matter, that § 1983 affords a remedy for negligent deprivation of federally protected rights by persons acting under the color of state law," *id.* at 856, is too broad. It was, in any event, unnecessary to the holding of the case that the established state procedures at issue violated due process.

A construction that § 1983 does not encompass negligence actions does not restrict its function as the primary vehicle to provide redress for unconstitutional action by state employees that violates the constitution.[7] We eschew prescribing a comprehensive litmus test to determine which actions are or are not within § 1983, particularly since such a test has so far eluded the Supreme Court, but the pattern emerges from earlier cases.

Application of force by police officers or prison guards exceeding that which is reasonable and necessary under the circumstances states a claim under § 1983. *Black v. Stephens*, 662 F.2d at 188; *Howell v. Cataldi*, 464 F.2d at 282; *Martinez v. Rosado*, 614 F.2d 829 (2d Cir. 1980). Similarly, if the officials encouraged others to use excessive force, the officials would be liable. *See Black v. Stephens*, 662 F.2d at 189 (alternative basis for liability against police chief was policy of encouraging police officers to use excessive force).

Liability under § 1983 may be imposed on prison officials even when the assault has been committed by another prisoner, if there was intentional conduct, deliberate or reckless indifference to the prisoner's safety, or callous disregard on the part of prison officials. *See Wade v. Haynes*, 663 F.2d 778, 780-81 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade*, 103 S. Ct. 1625 (1983) (verdict sustained against correctional officers and the superintendent of the reformatory for placing the prisoner in a dangerous

7. Although in this case we deal with due process violations under the Fourteenth Amendment, the constitutional deprivation supporting § 1983 recoveries is not limited to that provision. *See, e.g.*, Brule v. Southworth, 611 F.2d 606 (1st Cir. 1979) (discharge for exercise of First Amendment rights); Tinetti v. Wittke, 620 F.2d 160 (7th Cir. 1980) (strip search for traffic violation infringed Fourth Amendment).

situation in which it was highly foreseeable that the assault would occur); *Holmes v. Goldin*, 615 F.2d 83, 85 (2d Cir. 1980) (prisoner assaulted by another prisoner entitled to an opportunity "to show purposeful acts on the part of the correction officers or deliberate indifference to his safety amounting to a violation of due process.") This is consistent with our holding in *Curtis v. Everette*, 489 F.2d at 518, that allegations by a prisoner of "intentional conduct" by prison officials who stopped him from defending himself when assaulted by another prisoner stated a § 1983 claim.

Other cases provide examples of conduct beyond mere negligence that fall within the scope of § 1983. In *Stokes v. Delcambre*, 710 F.2d 1120, 1124 (5th Cir. 1983), the court held that "the jury could have concluded that the jail was administered in a manner virtually indifferent to the safety of prisoners" and that under those facts, the defendants would be held to have violated the prisoners' constitutional rights, whether expressed in Fifth or Eighth Amendment terms. Moreover, when officials with a responsibility to prevent harm, such as prison officials, fail to establish or execute appropriate procedures for preventing serious malfunctions in the administration of justice, such failure would support a claim under § 1983. *See, e.g., Murray v. City of Chicago*, 634 F.2d 365 (7th Cir. 1980), *cert. dismissed sub. nom. Finley v. Murray*, 456 U.S. 604 (1982). Similarly, a regulation issued by the Police Chief delaying disciplinary hearings against police officers until adjudication of the underlying arrest charges which caused officers to file unwarranted charges against plaintiff fell within § 1983. *Black v. Stephens*, 662 F.2d at 189-90.

Another vital area in which § 1983 plays an effective role is in providing a federal forum to challenge an established state procedure that infringes

upon an individual's liberty or property interests, such as the Illinois procedure by which a claim could be terminated through no fault of the claimant declared invalid in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), or the New Jersey statute prohibiting prisoners from bringing tort actions against public entities or employees while confined struck down in *Holman v. Hilton*, 712 F.2d 854 (3d Cir. 1983).

We thus reaffirm that actions may be brought in federal court under § 1983 when there has been infringement of a liberty interest by intentional conduct, gross negligence or reckless indifference, or an established state procedure.[8] The viability of such § 1983 actions does not depend on whether or not a postdeprivation remedy is available in state court. We do not read anything to the contrary in the holdings in *Parratt* and *Hudson*, which concerned a prisoner's property right. It is untenable that the Court intended in those cases to subject all suits for unconstitutional acts under color of law, including those implicating a liberty or life interest, to a state remedy, if available. Such an interpretation would deprive § 1983 of its original remedial purpose to "aid [in] the preservation of human liberty and human rights", see remarks of Representative Shellabarger during the Congressional debates surrounding the passage of the forerunner of § 1983, *quoted in Owen v. City of Independence*, 445 U.S. 622, 636 (1980), and would reduce its scope to the rare instances where the state has foreclosed a remedy, as here. The Court has repeatedly declined to require exhaustion of state remedies for § 1983 actions. *See Patsy v. Florida Board of Regents*, 457 U.S. 496, 500 (1982); *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on [§ 1983]

8. Judges Weis and Garth do not believe that this case presents the issue of gross negligence and do not join in the reference to it.

we have not required exhaustion of state judicial or administrative remedies)". We read *Parratt* and *Hudson* as decided in the context of prisoners' interests in their personal property which were fully redressable by the available state remedies.

In contrast, at issue here is a liberty interest. In determining whether behavior deprives the plaintiff of a substantive Fourteenth Amendment liberty interest, we must again focus on what constitutes due process. As the Supreme Court stated in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), the Due Process Clause imposes requirements of decency and fairness because they are "implicit in the concept of ordered liberty". In *Rochin v. California*, 342 U.S. 165 (1952), the Court described a violation of substantive rights under the Due Process Clause as "conduct that shocks the conscience." *Id.* at 172. The Court did not say whether anything less would suffice, and it declined to formulate a test: "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Id.* at 173.

The conduct of the two prison officials here fails to rise to that level. Cannon followed the established procedure in directing Davidson to the proper officer, but he simply failed to follow up. James, who was operating under a double shift burden, merely forgot to investigate a prisoner's note, which was ambiguous as to the nature of the threat, and conveyed no sense of urgency. When the only finding is that of mere negligence, as here, we cannot find the "outrageousness" or abuse of official power that warrants raising the tortious conduct of the prison official to the level of a deprivation of constitutional right within the scope of § 1983. *Accord Braun v. Brewer*, 669 F.2d 1297, 1298 (8th Cir. 1982) (per

curiam) (Eighth Amendment); *Williams v. Kelley*, 624 F.2d 695, 697-98 (5th Cir. 1980) (Fourteenth Amendment), *cert. denied*, 451 U.S. 1019 (1981).

In summary, we hold that § 1983 retains its central role in affording remedies for victims of constitutional deprivation, but that such a role does not extend to providing a remedy for the type of negligence found in this case.[9]

V.

Davidson has suggested that his claim should be viewed as one of deprivation of procedural due process. His contention appears to be that when New Jersey enacted the statute foreclosing suit by a prisoner against either the state or a prison employee for

9. Our holding avoids the anomalies that would result were a prisoner's § 1983 suit such as this under the Fourteenth Amendment to be judged under a lesser standard of care than the deliberate indifference standard applicable to a prisoner's Eighth Amendment claim, *see* Estelle v. Gamble, 429 U.S. 97 (1976), or were a prisoner to be entitled under the Constitution to a higher standard of care than an involuntarily committed mental patient, *see* Youngberg v. Romeo, 457 U.S. 307 (1982).

Some members of this court believe that in circumstances such as those presented here, the Eighth Amendment standard is the same as that of the substantive due process clause of the Fourteenth Amendment, and that consistency demands that the Fourteenth Amendment not proscribe conduct the Eighth Amendment permits. *See* Williams v. Mussomelli, 722 F.2d 1130, 1132-34 (3d Cir. 1983). *See also* Rhodes v Robinson, 612 F.2d 766 (3d Cir. 1979) (discussion of opinions applying similar standards in cases arising under the two amendments).

However, other members of the court believe the standard for liability under § 1983 "may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." *See* Baker v. McCollan, 443 U.S. at 140-41. Because the district court in this case found that there was no Eighth Amendment violation, and no cross-appeal has been filed, the Eighth Amendment issue is not before us.

injuries suffered by another prisoner, N.J. Stat. Ann. 59:5-2(b)(4) (West 1982), it violated his right to procedural due process. For a number of reasons we reject this claim.

In the first place, plaintiff here, unlike the plaintiff in *Holman v. Hilton*, 712 F.2d 854 (3d Cir. 1983), has not challenged the constitutionality of the statute. Plaintiff's claim, instead, is only for money damages from the defendants for the injuries inflicted by the assault.

In the second place, a claim for procedural due process must be predicated on deprivation of a substantive right or interest created by the Constitution, a statute or other entitlement. *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976). Since we have rejected Davidson's claim that his substantive right under the Fourteenth Amendment was deprived by defendants' negligence, and there has been no claim of a statutory or other entitlement, there is nothing to trigger an inquiry into what process is due.

In any event, nothing in the Constitution insures that a putative plaintiff may maintain a particular type of negligence claim in state court. The tradition of immunity was firmly rooted before the passage of § 1983. *See Owen v. City of Independence*, 445 U.S. 622, 637-38 (1980). In *Martinez v. California*, 444 U.S. 277, 281-83 (1980), the Court rejected the claim that a state statute which foreclosed a tort suit established a federal constitutional violation. In sustaining the dismissal of a § 1983 action brought for death caused by a released parolee, the Court held constitutional a state statute similar to that here providing all public entities and public employees with immunity from liability for their action in releasing a parolee.

Nor do we find any merit in plaintiff's argument which seeks to distinguish between previously existing

immunities and those recently created. As the Court stated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982):

> the State remains free to *create* substantive defenses or immunities for use in adjudication -- or to eliminate its statutorily created causes of action altogether -- just as it can amend or terminate its welfare or employment programs.

(emphasis supplied). The Court explained in *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979), "For when a state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *See Daniels v. Williams*, 720 F.2d 792, 798 (4th Cir. 1983).

The implication of Davidson's procedural due process claim is almost unlimited. It would subject to procedural due process scrutiny every state decision to immunize a public entity and employee from discrete claims, *see, e.g.*, N.J. Stat. Ann. 59:4-6, (creating immunity from liability caused by the plan or design of public property). Davidson has provided no authority to support such a far reaching extension of procedural due process,[10] and the available authority, as stated above, is to the contrary.

VI.

For the foregoing reasons we will reverse the judgment of the district court and direct entry of judgment for defendants.

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10. The New Jersey provision struck down in Holman v. Hilton, 712 F.2d 854 (3d Cir. 1983), did not create a substantive defense but instead precluded a prisoner from asserting the cause of action to which s/he was entitled until the prisoner was released from prison. *Id.* at 857-58. That holding is not jeopardized by this opinion.

GARTH, J., *Circuit Judge*, concurring, with whom Judge Weis joins:[1]

Although I have joined Judge Sloviter's majority opinion, I write separately to express my view that even if mere negligence could constitute a deprivation of Davidson's liberty interest (a proposition with which I do not agree) there is no requirement or reason that a remedy must be provided by 1983 in federal court. Stated differently, just because no remedy is available to Davidson under state law, it does not follow that *some* remedy must be made available *somewhere* -- and that therefore the remedy in this case must be a constitutionalized remedy under 1983. I suggest that only an incomplete analysis can reach such a result and that if an appropriate procedural due process analysis is employed,[2] the result in this case will be no different than the result at which the majority opinion has arrived by distinguishing between property and liberty interests. In both circumstances, Davidson still cannot prevail over the State and its officials.

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1. Both Judge Weis and Judge Garth join the the majority opinion.

2. As the majority opinion correctly states (Maj. Op. at page 29) a claim for procedural due process arises only after a deprivation of some substantive right or interest created by the Constitution, by statutes, or by other entitlement. Bishop v. Wood, 426 U.S. 341, 344 (1976); Meachum v. Fano, 427 U.S. 215 (1976). Because the majority of this court has rejected Davidson's claim that his substantive right under the Fourteenth Amendment was deprived by the defendants' negligence, the majority opinion had no occasion to consider a procedural due process analysis. I would not do so either were it not for the position taken by our colleagues, who are not in the majority that a procedural due process analysis would provide Davidson with a 1983 action in federal court and would thus lead to a result contrary to the result reached by the majority.

I.

If New Jersey, as it has here, provides immunity against Davidson's claim, then an appropriate due process analysis should be concerned with whether the state's interest in protecting its prison officials in such a situation outweighs Davidson's interest in having available a monetary cause of action against prison officials for merely negligent conduct. The particular balance to be struck must measure the state's interest in crafting its own tort laws and immunities against Davidson's interest in having more extensive remedies than those afforded by state law.[3]

In a similar context, the Supreme Court has written that "even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly

For purposes of this discussion, therefore, I will assume that mere negligence by state officials could constitute a deprivation of Davidson's liberty interest. However, it does not follow from that assumption that the remedy must be provided in federal court pursuant to section 1983. To hold that negligent conduct by a state official serves to convert duties imposed by state tort law into substantive constitutional violations which lay the necessary predicate for a procedural due process inquiry is not a result compelled by Parratt v. Taylor, 457 U.S. 527 (1981).

3. There is analogous precedent for this type of balancing of interests where immunity has been upheld in a variety of circumstances. See Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982) (President is absolutely immune from suit); Butz v. Economou, 438 U.S. 478, 513-14 (1978) (Administrative Law Judge employed by Executive Branch absolutely immune from prosecution); Imbler v. Pachtman, 424 U.S. 409, 420-28 (1976) (prosecutor absolutely immune from liability for decision to initiate prosecution); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (state municipal judge absolutely immune from prosecution under section 1981).

arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980). In *Martinez*, the court held that a California statute, which granted absolute immunity to public employees responsible for parole-release decisions, was not an unconstitutional deprivation of due process when applied to defeat a tort claim arising under state law.

Nor should *Parratt v. Taylor*, 451 U.S. 527 (1981) be read to constrain a state's ability to establish its own substantive rules of law when such rules create no conflict with federal law. *See Ferri v. Ackerman*, 444 U.S. 193, 198 (1979). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), the court reiterated that "the state remains free to create substantive defenses or immunities for use in adjudication -- or to eliminate its statutorily created causes of action altogether -- just as it can amend or terminate its welfare or employment programs."

No authority has been called to my attention that supports the conclusion that a state's immunity statute must ineluctably lead to a denial of due process such that section 1983 must be expanded to encompass negligence actions. The absence of a particular state remedy cannot, without more, require that a federal remedy be provided.[4] In terms of a procedural due process analysis, it then must be

4. Were an absolute grant of immunity, precluding state tort suits, sufficient to establish a right to a federal remedy, a pedestrian negligently struck by a police car racing to apprehend a criminal, would be entitled to maintain a 1983 action in federal court if a state immunity statute shielded police from liability for negligent acts occurring in the course of duty. Yet, if the enactment of an immunity statute by a state is deemed to result in a federal remedy by default, not only would the state's legitimate interest in fashioning rules of tort law be curtailed, but also state law would then determine the content of 1983 actions in federal court. This reasoning "would make the Fourteenth Amendment a font of tort

determined "what process is due" Davidson. The Fourth Circuit in *Daniels v. Williams*, 720 F.2d 792 (4th Cir. 1983) held that a state may plead sovereign immunity as an affirmative defense. In that case the plaintiff would have received procedural due process when and even though the state's affirmative defense was sustained. Here, even if we were to assume that the negligence of the defendants, Cannon and James, amounted to a "deprivation of liberty," consideration must be given to the state's strong interest in protecting its prison officials from liability.

Such decisions require an inherently delicate determination, a determination which would balance prison order and safety against an individual's traditional desire to obtain a monetary response for injury suffered through a negligent act. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (creating qualified immunity for public officials performing discretionary functions). Thus, in this instance, if the balance is struck in favor of the state as I suggest it must be, Davidson has had all the process which is his due. This being so, there is no requirement that Davidson be assured a cause of action against the state or the state's officers for arguably negligent conduct, let alone a 1983 action in federal court. This does not mean, of course, that Davidson may not pursue any claim that he may have against McMillan, the prisoner who actually attacked him.

Accordingly, I suggest that those who advocate a federal constitutional remedy by default (where no state remedy is available) have failed to consider and to balance the state's interest against the interest

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law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701 (1976). I suggest that to allow a federal constitutional remedy in the circumstances presented here is not only contrary to the purposes of section 1983 but necessarily trivializes 1983 actions.

asserted by the claimant. In failing to do so, they have also failed to recognize that a state may afford appropriate due process without that process necessarily resulting in a recovery for the claimant.[5] *See, e.g., Daniels v. Williams*, 720 F.2d 792 (4th Cir. 1983). In this case, therefore, it is evident to me that whether the majority's analysis is followed -- an analysis and result which I believe to be wholly correct -- or an *appropriate* due process analysis is developed -- the conclusion we reach must necessarily be the same. Judgment must be entered for the defendants.

SEITZ, *Circuit Judge*, dissenting.

I part company with the majority because I read the Supreme Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), to dictate a different result. In *Parratt*, the Court considered whether "mere negligence will support a claim for relief under § 1983 . . . ." *Id.* at 532. The polestar of its analysis was "the complex interplay of the Constitution, statutes and facts" of the particular case. The Court eschewed "a single, general principle, however just that principle may be in the

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5. Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) is not to the contrary. Admittedly, *Thibodeaux* does not adopt the majority's distinction between "liberty interests" and "property interests." However, in its procedural due process analysis, *Thibodeaux* affirmed the dismissal of the plaintiff's negligence action remitting him to his state law remedies. *Thibodeaux* does not address or discuss what result would obtain if *no remedy* were available in the Louisiana state courts. Nothing in *Thibodeaux* indicates that in such a situation the Fifth Circuit would then hold that the plaintiff had stated a federal cause of action under 1983. To the contrary, throughout its opinion, *Thibodeaux* cites the Fourth Circuit case of *Daniels v. Williams*, 720 F.2d 792 (4th Cir. 1983) with approval. It should be remembered that *Daniels* did not remit the plaintiff to a federal cause of action when his state claim was barred by the doctrine of sovereign immunity.

abstract . . . ." *id.* at 531-32. Thus, the question presented here is not the abstract one of whether, as a general principle, negligence may support a § 1983 claim. Rather, the issue is whether plaintiff, under the facts of this case, has satisfied the specific requirements of § 1983.

Looking to the language of the Fourteenth Amendment and § 1983, the *Parratt* Court identified four elements which are necessary to any § 1983 claim purporting to be founded on a violation of the Due Process Clause of the Fourteenth Amendment.[1] First, the conduct complained of must have been committed by a person acting under color of state law. Second, an interest in life, liberty, or property must be implicated. Third, the conduct complained of must amount to a deprivation. And fourth, the state must have failed to provide due process of law. *Id.* at 535-37. The Court then applied this legal standard to the facts in *Parratt*.

The case before us is determined by the application of this four-part analysis. First, the defendants actions in this case were clearly under color of state law. *See Monroe v. Pape*, 365 U.S. 167, 172-85 (1961). Defendants do not argue otherwise.

Second, as the majority holds, plaintiff's claim falls within the scope of his Fourteenth Amendment liberty interest in personal security. *See Youngberg v. Romeo*, 457 U.S. 307 (1984). A prison inmate retains his liberty interest except to the extent that it is "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson v. Palmer*, 52 U.S.L.W. 5052, 5053 (1984). Plaintiff's interest in being free from assault was surely not inconsistent with his status as a prisoner or with any legitimate penological objective.

[1] This case does not call upon us to consider § 1983 claims founded on alleged violations of constitutional provisions other than the Due Process Clause.

Third, the conduct complained of constitutes a deprivation. The Supreme Court held that the negligently caused loss of property in *Parratt* "[u]nquestionably . . . amounted to a deprivation." 451 U.S. at 536-37 (footnote omitted); *see Holman v. Hilton*, 712 F.2d 854, 856 (3d Cir. 1983)("section 1983 affords a remedy for negligent deprivations"). I can think of no persuasive reason why a negligently caused loss of a liberty interest is any less of a deprivation.

Fourth, and finally, did the State of New Jersey provide due process of law? The state could not, of course, provide any predeprivation procedure. It has seen fit, however, to deny any postdeprivation remedy against defendants as well. Thus, we are not called upon to determine what would constitute adequate procedures in these circumstances. Furthermore, we need not consider the separate issue of what conduct might constitute a violation of substantive due process "even if undertaken with a full panoply of procedural protection" because it is "antithetical to fundamental notions of due process." *Parratt v. Taylor*, 451 U.S. at 545 (Blackmun, J., concurring). Since some procedural process is due when a person, acting under color of state law, deprives an individual of a liberty interest, the Due Process Clause of the Fourteenth Amendment has been violated in this case.[2] Therefore, plaintiff's claim is cognizable under § 1983.

[2] In this case, the mere right to file an action is tantamount to no process at all since, under New Jersey's immunity statute, the action must be terminated prior to any proceedings on the merits. It is true that due process does not always require proceedings on the merits. For instance, "the state certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). But this state immunity statute denies any "opportunity for [a] hearing appropriate to the nature of the case," *Id.* at 428 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306,

This conclusion does not implicate a significant increase in § 1983 actions founded on alleged violations of the Due Process Clause because, as a general matter, states do not bar postdeprivation actions against their employees. States remain free, under *Parratt*, to provide an adequate postdeprivation remedy for their employees' negligent deprivations of property and negate the possibility of a § 1983 claim based on the denial of procedural due process. The reasoning in *Parratt* suggests that the same is true in the liberty context. 451 U.S. at 537-44; see *Thibodeaux v. Bordelon*, 740 F.2d 329, 334-37 (5th Cir. 1984)("no reason to differentiate between liberty interests and property interests" in the context of procedural due process)(Wisdom, J.). And, of course, that plaintiff "might not be able to recover under these remedies the full amount which he might receive in a § 1983 action is not . . . determinative of the adequacy of the state remedies." *Hudson v. Palmer*, 52 U.S.L.W. at 5056; *Parratt v. Taylor*, 451 U.S. at 543-44.

My analysis implicitly rejects the contention that a prisoner cannot succeed under § 1983 for a deprivation of his Due Process liberty interest in circumstances where the Eighth Amendment "deliberate indifference" standard would not be satisfied. *Parratt* mandates that this contention be rejected unless, under the Due Process Clause, prisoners' liberty interests are to be given less protection than their property interests. Furthermore, consistency does not require that the standards under the two provisions be the same. On the one hand, there

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313 (1950)). Only a federally recognized immunity justifies this result, otherwise "a state immunity defense . . . would transmute a basic guarantee into an illusory promise . . . ." *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980)(quoting *Hampton v. Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied* 415 U.S. 917 (1974)).

is a constitutional violation whenever the Eighth Amendment "deliberate indifference" standard is satisfied, since the violation is the deliberate indifference itself. On the other hand, a negligent deprivation of a liberty interest amounts to a violation of procedural due process only where the state fails to provide adequate postdeprivation procedures, since for Due Process Clause purposes "the State's action is not complete until and unless it provides or refuses to provide a postdeprivation remedy." *Hudson v. Palmer*, 52 U.S.L.W. at 5056. In sum, the causes of action under the Eighth and Fourteenth Amendments are birds of entirely different feathers.

I disagree with the majority's holding essentially because it finds no deprivation in this case. It does so without quoting the essential language in *Parratt*, which holds that plaintiff's loss in that case "even though negligently caused, amounted to a deprivation." 451 U.S. at 536-37 (footnote omitted).

Justice Powell, concurring in the result in *Parratt*, "would not" have held, under the facts of that case, that "a negligent act . . . works a deprivation in the *constitutional sense*." *Id.* at 548. That he refused to join the majority opinion supports my reading of *Parratt*. Although there is much to be said for Justice Powell's opinion, which "would avoid trivializing the right of action provided in § 1983," we are not free to weigh the persuasiveness of his approach against that of the Court's and choose for ourselves which to apply.

Our court feels constrained to hold in this case that mere negligence does not constitute a deprivation, apparently because it equates two wholly different questions. The majority first notes that *Parratt* did not purport to announce a turn-around from the Supreme Court's prior position that traditional torts do not become constitutional violations simply because they are committed by state officials. On this basis it then

conclude that the *Parratt* Court could not have held that mere negligence amounts to a deprivation. Although it is, of course, true that the Supreme Court did not hold that mere negligence by a state official amounts to a constitutional tort cognizable under § 1983, it did hold that such negligence amounts to a deprivation. Therefore, if the other elements of a § 1983 claim purporting to be founded on a violation of the Due Process Clause of the Fourteenth Amendment are made out; i.e., conduct under color of state law, a life, liberty or property interest, and a lack of adequate due process; then the § 1983 claim is cognizable.

The majority focused on the abstract, general question, eschewed by the Supreme Court, of whether mere negligence amounts to a constitutional violation cognizable under § 1983. Consequently, it failed to answer properly whether plaintiff has satisfied the specific requirements of the statute, particularly the "deprivation" requirement, as they were analyzed by the Supreme Court in *Parratt*. Plaintiff, in my view, has satisfied those requirements.

I would affirm.

GIBBONS, *Circuit Judge*, dissenting.

The question presented in this appeal is a narrow one: may a state, when it involuntarily commits persons to the custody of state agents, thereby depriving those persons of the capacity for flight, self defense, or calls for assistance, consistent with the fourteenth amendment relieve those agents of the duty to take reasonable care to prevent third parties from injuring them. No broader issue is presented, for we are not here dealing with the duty of care owed to persons at liberty. No narrower question is presented either, for regardless of the reasons for commitment -- civil or criminal, pre-trial or post-trial -- every involuntarily committed person is identically deprived

of the ability to resort to self help against the acts of third parties.

There was a time in our history when the government of the United States was so indifferent to the plight of persons involuntarily committed to custody by the states that it condoned hundreds of lynchings per year.[1] Among civilized persons in this twelfth decade of the fourteenth amendment, however, I would have hoped that a negative answer to the question presented would no longer be a matter of serious debate. Whatever a state may do in relieving its agents of the obligation to take reasonable care in performing other duties, no body politic calling itself humane should assert that the custodians of the involuntarily committed may be relieved of the duty to take reasonable care to prevent harm from befalling their charges.[2] Yet six judges of this court unfortunately are of the view that custodians may be relieved of that duty. Because I share a common humanity with the involuntarily committed, I dissent.

I.

The Injury

Robert Davidson, a former inmate of the New Jersey State Prison at Leesburg, suffered serious

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1. United States v. Harris, 106 U.S. 629 (1882) (Federal antilynching law unconstitutional); J. Chadbourn, *Lynching and the Law* (1933); W. White, *Rope & Faggot* (1929); National Association for the Advancement of Colored People, *Thirty Years of Lynching in the United States 1889-1918* (1919); J. Cutler, *Lynch-Law: An Investigation of the History of Lynching in the United States* (1905).

2. *But see* Union County Jail Inmates v. DiBuono, 713 F.2d 984, 718 F.2d 1247 (3d Cir. 1983) (pretrial detainees and sentenced inmates may be confined in conditions comporting substantially with those permitted by federal law regulating the confinement of animals).

personal injuries when he was beaten and stabbed by another inmate. In a suit brought in the district court pursuant to 42 U.S.C. § 1983 (1982) he contended that the beating and stabbing occurred because two state prison officers, Joseph Cannon and Robert James, failed to take reasonable care to prevent the incident. The trial court found that Cannon and James did fail to take reasonable care to prevent the incident, and awarded $ ...000 in compensatory damages. This court holds unanimously that the district court's findings of fact are not clearly erroneous. Fed. R. Civ. P. 52(a). Therefore, for purposes of this appeal we agree that the state agents to whom the state entrusted custody of Davidson failed to take reasonable care to prevent a third party from inflicting harm on him.

II.

The New Jersey Scheme for Relieving its Agents of Responsibility

An appreciation of the New Jersey scheme for relieving its agents of responsibility requires an examination of developments in another state. In *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 359 P. 2d 457, 11 Cal. Rptr. 89 (1961) Justice Traynor, in a typically enlightened opinion, held that the doctrine of governmental immunity in tort had outlived its usefulness. While at that time governmental entities in California and elsewhere claimed sovereign immunity from *respondeat superior* liability for the acts of their agents and servants, those agents and servants were, like the rest of us, subject to common law remedies except to the extent that judicial, legislative or executive officer immunity doctrines held otherwise. In reaction to Justice Traynor's opinion the California legislature passed a two-year moratorium on the application of the

Muskopf holding while the State Law Review Commission studied the matter further.[3]

Justice Traynor would simply have made governmental agencies liable on a traditional *respondeat superior* basis, leaving in place the centuries old common law individual liability in tort of state agents. The Commission proposed a radically different approach. Accepting the proposition that the state could be liable in tort on a *respondeat superior* basis, it proposed, for the first time, to enlarge the areas in which state agents would enjoy personal immunity, and to make the state's immunity coextensive.[4] The result of the Commission's efforts was the California Tort Claims Act of 1963.[5]

Several years later when the New Jersey legislature, observing the New Jersey Supreme Court's discomfort with sovereign immunity in cases such as *H. W. King, Inc. v. West New York*, 49 N.J. 318, 325, 230 A.2d 133, 137 (1967), considered the problem of governmental liability, it adopted the California approach, which recognized that governmental entities were subject to *respondeat superior* liability, but conferred on state agents in many instances an immunity from common law actions which they had never before in history enjoyed.[6] The purpose of the

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3. 1961 Cal. Stat., c. 1404, p. 3288, codified at Cal. Civ. Code § 22.3, Cal. Gov't Code § 9611 (West 1982) (repealed 1978).

4. *Cf.* Owen v. City of Independence, 445 U.S. 622 (1980) (government entity does not enjoy immunities of its agents).

5. Cal. Gov't. Code § 810 *et seq.* (West 1982 & Supp. 1983).

6. The New Jersey Courts have repeatedly acknowledged the California precedence of the New Jersey Tort Claims Act. See, e.g., *Birchwood Lakes Colony Club, Inc. v. Borough of Medford*, 85 N.J. 582, 429 A.2d 372 (1981); *Rivera v. Gomez*, 178 N.J. 226, 416 A.2d 308 (1982); *Bourne v. Bourne*, 86 N.J. 565, 432 A.2d 563

legislature to contract common law liability of state agents is clear, for it declared "that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done." N.J. Stat. Ann. § 59:1-2 (West 1982). The declaration of purpose refers not to government *liability* as was the case under common law sovereign immunity, but rather to government *duty*. That change in focus from the absence of state *liability* to the absence of state *duty* is the central feature of the Act. It provides that "[a] public entity is not liable for ... injury resulting from an act or omission of a public employee where the public employee is not liable." *Id.* § 59:2-2(b). Like its California counterpart, the New Jersey Act then provides a series of absolute statutory immunities which eliminate common law remedies historically available against such employees.[7]

The Tort Claims Act provides that the Attorney General must defend any action brought against a present or former state employee. *Id.* § 59:10A-1. It provides, moreover, that the State shall provide indemnification to present and former employees except for punitive or exemplary damages. *Id.* § 59:10-1. Thus under the Tort Claims Act the state's indemnification and defense undertaking, and the broad provisions for official immunity, are directly

(1981); *Costa v. Josey*, 83 N.J. 49, 415 A.2d 337 (1980); *Kolitsch v. Lindenfeld*, 193 N.J. Super. 540, 475 A.2d 86 (App. Div. 1984); *Speziale v. Newark Housing Authority*, 197 N.J. Super. 413, 474 A.2d 1085 (App. Div. 1984).

7. The Act makes a distinction between retrospective remedies at law and prospective remedies in equity. N.J. Stat. Ann. § 59:1-4 (West 1982). Obviously a prospective remedy would be of no use to Davidson. *See Ex Parte Young*, 209 U.S. 123 (1908).

related. The state has undertaken to provide a form of claim and liability insurance for its employees, as a self-insurer, at public expense. Simultaneously, however, the state has attempted to protect its fisc by conferring on its employees and retaining for itself absolute immunity from recovery for certain injuries. And, as is apparent from the Attorney General's appearance in this appeal, New Jersey construes its statutory defense and indemnification obligations as extending to the defense of actions brought pursuant to 42 U.S.C. § 1983. The state is the real party in interest.

The atmosphere in which the New Jersey Tort Claims Act was considered by the legislature was hardly conducive to dispassionate reflection upon the appropriate balance between the needs of society and the accountability of state agents. At the time the Act was passed, lawsuits still were pending against New Jersey officials growing out of what the plaintiffs in those lawsuits contended were either excessive or inadequate reactions to the civil disturbances in 1967. In that atmosphere, perhaps not surprisingly, the legislature conferred several rather radical immunities on law enforcement officials and on custodians of involuntarily committed persons.

A number of New Jersey's immunity provisions bear upon the duty owed by custodians toward persons whom the state has placed in their charge. Perhaps the broadest is the provision that "[a] public entity is not liable for any injury caused . . . by failing to enforce any law." N.J. Stat. Ann. § 59:2-4 (West 1982). Moreover "[n]either a public entity nor a public employee is liable for failure to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service." *Id.* § 59:5-4. Thus New Jersey public employees appear to be totally relieved of the duty to prevent even a

lynching, for example. The Act also provides that "[n]either a public entity nor a public employee is liable for failure to provide a medical facility or mental institution, or if such facility or institution is provided, for failure to provide sufficient equipment, personnel or facilities in a mental institution or medical facility."[8] *Id.* § 59:6-2. When a person has been confined for mental illness (which by definition includes mental deficiency) "[n]either a public entity nor a public employee is liable for . . . (b) an injury caused by any person who has been confined . . . upon any other person so confined." *Id.* § 59:6-7. Finally, neither a public entity nor a public employee is liable for . . . (b) any injury caused by: . . . (4) a prisoner to any other prisoner." *Id.* § 59:5-2(b)(4). Thus the New Jersey Act treats civilly committed mental patients, and both pretrial detainees and convicted prisoners, in the same manner. It has conferred on the custodians a total immunity from any claim that they failed to exercise any level of care to prevent harm from fellow inmates. Moreover by eliminating liability for failure to provide police protection, New Jersey has relieved non-custodians, as well, of any obligation to prevent such harm.[9]

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8. *Cf.* Youngberg v. Romeo, 457 U.S. 307 (1982); Bowers v. Riese, 720 F.2d 266 (3d Cir. 1983).

9. Other immunity provisions in the Tort Claims Act, not significant for the duty of care owed to persons involuntarily confined, relate to 42 U.S.C. § 1983 in other respects. These include N.J. Stat. Ann. §§ 59:2-5 and 59:3-6 (West 1982) (no liability for an injury caused by issuance, denial, suspension or revocation of, or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization); *Id.* §§ 59:2-8 and 59:3-13 (no liability for injuries caused by the termination or reduction of benefits under a public assistance program); *Id.* § 59:3-2 (no liability for an injury resulting from exercise of judgment or discretion); *Id.* § 59:3-3 (no liability

Under the New Jersey immunity scheme the state agent's state of mind is irrelevant. Immunity attaches whether the immunized agent acted or failed to act intentionally, or in reckless disregard of the consequences, or without reasonable care. Thus, under New Jersey law, Davidson could not recover from Cannon or James, or from the state, for the injuries he received at the hands of his fellow inmate under any conceivable set of circumstances. And in this respect the outcome would be the same under New Jersey law had Davidson been a patient in a New Jersey mental institution.

III.

The Federal Liberty Interest

Recognizing that it is beyond the power of the legislature, in California or New Jersey, to relieve state agents acting under color of those states' laws, of duties imposed by the constitution, the Attorney General of New Jersey urges that Davidson has no interest protected by the constitution or laws of the United States. Any right that he had to personal security from harm by fellow prisoners ended, according to the state, when Davidson was involuntarily committed to the custody of those state agents upon whom New Jersey conferred immunity.

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for good faith action in execution or enforcement of any law); *Id.* § 59:3-4 (no liability for injury caused by action under apparent authority of a law that is unconstitutional, invalid or inapplicable); *Id.* § 59:3-5 (no liability for any injury caused by failure to enforce any law); *Id.* § 59:3-8 (no liability for injury caused by initiation or prosecution of any judicial or administrative proceeding); *Id.* § 59:3-9 (no liability for entry upon any property); *Id.* § 59:3-10 (no liability for misrepresentation made in scope of employment); *Id.* § 59:5-1 (no liability for failure to provide facilities in a prison or other correction facility); *Id.* § 59:5-4 (no liability for failure to provide police protection).

For a brief period in 1976 the Supreme Court appeared to be flirting with the dangerous notion that the liberty clause of the fourteenth amendment had no federal substantive content, except perhaps, such as was set forth explicitly in other provisions of the constitution. One example of that dangerous flirtation is *Paul v. Davis*, 424 U.S. 693, 710 (1976), effectively overruling the Court's holding in *Wisconsin v. Constineau*, 400 U.S. 433 (1971) that there is a federal substantive liberty interest in one's reputation. According to *Paul v. Davis*, the due process clause protects the personal liberty to maintain a good repute only if a state positive law creates such an interest in the first place. Other examples of the Court's tendency toward sapping the liberty clause of federal substantive content were *Meachum v. Fano*, 427 U.S. 215, 228 (1976) and *Montanye v. Haymes*, 427 U.S. 236, 243 (1976), holding that a state prisoner had only such right to be free from transfer to more onerous conditions of confinement as could be found in state positive law. The tendency in those cases was to equate for purposes of analysis, the separate terms "life, liberty, or property" in the fourteenth amendment. Indeed the Court majority in those rather ominous opinions made essentially the same analyses with respect to due process protection of claimed personal liberty interests as in modern times it customarily makes with respect to due process protections of property. *See, e.g., Bishop v. Wood*, 426 U.S. 341 (1976) (state law contract right required before employment is protected by due process clause); *Goss v. Lopez*, 419 U.S. 565 (1975) (state statutory right to attend school cannot be terminated without due process); *Board of Regents v. Roth*, 408 U.S. 564 (1972)(state law contract right required before employment is protected by due process clause); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (federal statutory entitlement cannot be terminated without

due process). Cf., *e.g., Lochner v. New York*, 198 U.S. 45 (1905) (state law cannot intrude upon federally protected right to contract). The Court's recognition that property rights are always creatures of some sovereign's positive law, and thus that the term "property" in the fourteenth amendment must always have some positive law content -- usually state law -- was entirely sound. But it was one thing to hold that a property interest did not exist aside from some state positive law which created it, and quite another to hold that the right to life or to liberty was equally dependent on state positive law. That mode of analysis would enable the state legislatures to deprive the life and liberty clauses of the fourteenth amendment of any real meaning. Justice Stevens saw in the Court's mode of analysis the danger that positivism would degenerate into totalitarianism, and sounded the alarm in his dissent in *Meachum v. Fano*:

> If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.
>
> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.

427 U.S. at 230. (Stevens, J., dissenting).

Whether because of Justice Stevens' warning against statism or for other reasons, the Court in 1977 reconsidered its drift in that direction. In *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) it held that "[a]mong the historic liberties . . . protected [by the due process clause] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." The holding in *Ingraham v. Wright* was a reiteration of the position taken by the Court prior to its 1976 flirtation with statism in matters of personal liberty. Indeed the court in *Ingraham v. Wright* relied on its holding in *Rochin v. California*, 342 U.S. 165 (1952) that the state violated a defendant's right to personal security by subjecting him, involuntarily, to a stomach pump. 430 U.S. at 673-74. The holding in *Ingraham v. Wright* confirmed the soundness of this court's opinion in *Curtis v. Everette*, 489 F.2d 516, 518 (3d Cir. 1973) *cert. denied*, 416 U.S. 995 (1974) that the fourteenth amendment was violated when prison guards permitted an assault on the plaintiff by a fellow prisoner, for our opinion also relied on *Rochin v. California*.

A year after *Ingraham v. Wright* the Court in *Addington v. Texas*, 441 U.S. 418 (1979) reconfirmed that the fourteenth amendment, entirely aside from state positive law, recognized the personal liberty to be free from constraint, holding that despite the state's *parens patriae* powers in providing care for persons unable to care for themselves, the state could not involuntarily commit those persons on proof of their condition no more substantial than a preponderance of the evidence.[10]

10. Addington v. Texas reconfirmed the authority of O'Connor v. Donaldson, 422 U.S. 563 (1975); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); In re Gault, 387 U.S. 1 (1967) and Specht v. Patterson, 386 U.S. 605 (1967).

The right of personal security at issue in *Ingraham v. Wright* was that of a student who was at liberty except for the mild coercion of the state's school attendance law. In *Addington v. Texas* the person alleged to be mentally ill was at liberty until the state attempted his involuntary confinement. Nevertheless the Court's reliance in *Ingraham v. Wright* on *Rochin v. California*, which involved a pretrial detainee, suggested that it would not distinguish, for purposes of the existence of the right to personal security, between persons at liberty and persons confined. This was confirmed a year after *Addington v. Texas* when in *Vitek v. Jones*, 445 U.S. 480, 490-91 (1980) the Court held that even a convicted prisoner had a federally protected liberty interest, entirely apart from state positive law, in freedom from confinement in a mental institution.

Still more recently in *Youngberg v. Romeo*, 457 U.S. 307 (1982) the Court strongly reiterated that all involuntarily committed persons, entirely aside from state positive law, retained a federally protected interest in personal safety. *Id.* at 315-16. The quotation in Judge Shoviter's opinion from Justice Powell's opinion of the Court in *Youngberg v. Romeo* establishes unequivocally that the right to be confined only in safe conditions applies equally to all persons whom the state commits involuntarily, regardless of the purpose of the confinement.

All the judges participating in this appeal, albeit with varying degrees of enthusiasm, join in rejecting New Jersey's contention that Davidson had no constitutionally protected right to personal safety while he was confined.[11] Convicted prisoners, pretrial

11. Judge Gerry's separate opinion is too sophisticated for my comprehension but since he joins in Judge Shoviter's opinion I assume that he approves the holding in Part III thereof that Davidson has a constitutionally protected right to personal safety while confined.

deistence, and the civilly committed all have that same right.[12]

IV.

The Absence of a State of Mind Requirement in Section 1983

Section 5 of the fourteenth amendment authorizes Congress to enforce its provisions by appropriate legislation. Congress might have left the enforcement of the amendment primarily to the Supreme Court exercising supervision over the courts of the states. Instead, even before its effective date, Congress passed for the first time a statute of general application implementing the first clause in Article III section 2 of the Constitution, authorizing the lower federal courts to exercise jurisdiction in cases arising under the constitution and laws of the United States.[13] When, following ratification of the amendment, Congress reenacted parts of the earlier statute, it used the broadest conceivable language, providing that "any person who . . . shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . . ."[14] This statute, codified at 42 U.S.C. § 1983, still contains the sweeping language of the 1871 Congress.

When the 1871 Congress acted, the federal courts

12. In this respect New Jersey is consistent. It denies any duty to protect the safety of any of them.

13. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.

14. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

had little prior experience with federal question jurisdiction. The only previous jurisdictional statute of any moment in that respect was that chartering the Second Bank of the United States, which had afforded the Marshall Court its sole opportunity to construe the first clause in Article III section 2. In *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 326 (1824) the Court held that Congress could confer on the lower federal courts federal question subject matter jurisdiction over any case in which was presented a question over which, had the case arisen in a state court, the Supreme Court would have potential appellate jurisdiction. It is reasonable to conclude that the sweeping language of the 1871 Civil Rights Act was intended to implement Article III section 2, with respect to matters covered by the fourteenth amendment, to the full extent permitted under *Osborn*. Moreover, at the time of its enactment, federal equity practice was nationally uniform. On the law side, however, the federal courts under the Process Act[15] borrowed the practice, as of the date of each state's admission to the Union, of the states in which they sat. Thus one may be reasonably certain that in 1871 when Congress used the language "any action at law" it was fully cognizant of the fact that government agents had always been subject to the full range of common law remedies, many of which had no state of mind requirement, and that in the future, persons acting under color of state law would be subject to that same full range of common law remedies in the federal courts.

15. Act of May 8, 1792, ch. 36, § 2, 7 Stat. 275, 276. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825) (changes in state procedural law inapplicable in actions at law in a federal court). Cf. Act of June 1, 1872, ch. 255, 17 Stat. 196.

The Civil Rights Act of 1871 was, of course, anesthetized by the Court following the constitutional settlement of 1877.[16] So deep was the sleep that a leading expert on practice in the federal courts writing in 1925 did not even include that Act in a listing of statutes providing exceptions to the jurisdictional amount requirement. *See*, Doble, *Jurisdictional Amount in the United States District Court*, 38 Harv. L. Rev. 733, 738 (1925). The Act remained dormant until the late 1930's. When it reemerged, the initial cases which placed any significance on the Act involved intentional action of a rather extreme sort.[17] Because the early cases after the statute was rediscovered involved conduct that was not only intentional, but also specifically endorsed by state law, it was not until some years after the Federal Rules of Civil Procedure had supplanted common law remedies in the federal courts that the Supreme Court addressed the question whether, for the first time, a state of mind requirement should be read into the sweeping language of section 1983. In *Monroe v. Pape*, 365 U.S. 167 (1961) the Court, for the first time after the post-reconstruction era, examined with any degree of consciousness the Congressional intention reflected in the 1871 Act.[18] Even Justice Frankfurter, who never fully reconciled himself to the Warren Court's disassociation from the constitutional settlement of 1877, acknowledged that a

16. The anesthesia was administered principally in *Carter v. Greenhow*, 114 U.S. 317 (1884), *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68 (1900) and *Barney v. City of New York*, 193 U.S. 430 (1904).

17. *Hague v. C.I.O.*, 307 U.S. 496 (1939) is the leading example.

18. The examination was less thorough then it should have been. *Compare, Monroe v. Pape*, 365 U.S. 167 (1961) *with Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

specific intent requirement could not be read into section 1 of the Act, although the criminal counterpart originating in the same statute had been so construed. In *Monroe*, he wrote:

> If the courts are to enforce § [1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. Specific intent in the context of the section would cause such embarrassment without countervailing justification. Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.

365 U.S. at 207-08 (Frankfurter, J., dissenting in part). Justice Frankfurter's dissent focused, instead, on the absence of a constitutional violation because the actions of the defendants were illegal under state law.[19] On that issue Justice Frankfurter stood alone. The Court was unanimously of the view, however, that no specific intent requirement could legitimately be written into section 1983 by judicial usurpation of the legislative function. If section 1983 was to reemerge from the closet in which it had been hidden by the post-reconstruction court, it would reemerge as written. In the words of Justice Douglas, section 1983

19. There are striking similarities between Judge Skovtir's opinion and Justice Frankfurter's *Monroe v. Pape* dissent. Judge Skovtir does not go so far, however, as to suggest as Justice Frankfurter urged that *Barney v. City of New York*, 193 U.S. 430 (1904) which had been cast in doubt by *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278 (1913), and overruled in *United States v. Raines*, 362 U.S. 17 (1960), should be reestablished. This Court is still unanimously of the view that the legality or illegality of a defendant's action under state law is not determinative for purposes of section 1983 or the fourteenth amendment.

"should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187.

The decision in *Monroe v. Pape* was not greeted with universal enthusiasm, even among Article III judges.[20] Despite *Monroe v. Pape*'s clarity on the state of mind issue, litigants frequently attempted to convince lower federal courts to judicially write a state of mind requirement into section 1983. One such attempt was made in this court when the defendants urged that the fact that a policeman defendant was motivated by personal animosity against the plaintiff sufficed to place his acts outside the scope of section 1983. That contention was rejected in *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965) by Judge Biggs, who unlike many of his contemporaries and successors, was an enthusiastic protector of civil rights.[21] His opinion stated:

> While a specific intent to deprive a person of his constitutional rights is required under criminal sections of the Civil Rights Acts, 18 U.S.C. §§ 241, 242, neither specific intent nor purpose to deprive an individual of his civil rights is a prerequisite to civil liability under the civil provisions of the Civil Rights Act.

Id. at 81. That, of course, was precisely what the Supreme Court had held unanimously in *Monroe v. Pape*, a case on which Judge Biggs expressly relied. *Id.* *Monroe v. Pape* and *Basista v. Weir* required no more

20. *See, e.g.*, Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 Law and Social Order 557 (1973).

21. *See, e.g., Picking v. Pennsylvania R. Co.*, 151 F.2d 240 (3d Cir. 1945); *Hague v. C.I.O.*, 101 F.2d 774 (3d Cir. 1939) *aff'd in part and modified in part*, 307 U.S. 496 (1939).

than proof of action under color of state authority, which is in this case conceded. Unlike Judge Sloviter's sophistical effort to find, in the several opinions written in *Monroe v. Pape*, something which is not there, Judge Biggs' treatment of that case is consistent with the position taken by *all* the justices on the critical issue in that case -- namely that only the *state* could violate the constitution. The language of Justice Harlan quoted by Judge Sloviter, typescript p. 13, refers to that issue -- the identity of the actor, not to any state of mind requirement.

Because not all lower court federal judges shared Judge Biggs' admirable enthusiasm for holding accountable all persons acting under color of state authority, it was not surprising that efforts to have the Court read a state of mind requirement into section 1983 would persist. Those efforts, as Judge Sloviter acknowledges, produced "no discernable thread." Typescript 12. Resistance to accountability by state officials in federal courts for their actions taken under color of state law did not slacken as the personnel of the Supreme Court changed during the 1970's, and several times it appeared that the *Monroe v. Pape* interpretation of section 1983 might be reconsidered. As Judge Sloviter acknowledges, the Court in *Procunier v. Navarette*, 434 U.S. 555, 560 n. 6 (1978) granted certiorari to consider whether a state of mind requirement should be read into that section, but the case was decided on an unrelated ground.

When the Fifth Circuit Court of Appeals held in *McCollan v. Tate*, 575 F.2d 509 (5th Cir. 1978) that a plaintiff should have a claim presented to the jury that the defendant sheriff had failed to take reasonable care to prevent his deputies from violating plaintiff's constitutional rights, the Court once again considered the section 1983 state of mind question. Justice Rehnquist wrote for the Court:

> Having been around this track once before in *Procunier, supra*, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action. In any event, before the relationship between the defendant's state of mind and his liability under § 1983 can be meaningfully explored, it is necessary to isolate the precise constitutional violation with which he is charged.

Baker v. McCollan, 443 U.S. 137, 139-40 (1979). The deprivation alleged in *Baker v. McCollan* was the detention, pursuant to a valid arrest warrant, of the wrong party. The Court held that the plaintiff had shown no invasion of any federally protected right, and thus once again declined to overrule the unanimous holding in *Monroe v. Pape* that section 1983 includes no state of mind requirement. Justice Rehnquist's admonition, however, that the answer to the question whether failure to exercise reasonable care to avoid or prevent constitutional violations "may not be susceptible of a uniform answer across the entire spectrum of constitutional violations" shows his awareness of the need to focus upon the nature of the interest being invaded -- either liberty or property -- and upon the extent to which actions by the state may have made it impossible for the victim to have avoided the invasion by action of his own.

It should be noted that in *Baker v. McCollan* the Court decided a constitutional law issue, holding that the fourth amendment was not violated by an inadvertent arrest and detention of the wrong

defendant pursuant to a valid warrant. A construction of section 1983 which would have read into it a state of mind requirement higher than the departure from reasonable care would have permitted the Court to avoid the decisions of that constitutional law question. *See Hagans v. Lavine*, 415 U.S. 528, 537-43 (1974). The Court could have held that assuming, arguendo, a fourth amendment violation had occurred as a result of the failure to take reasonable care to avoid it, Congress intended that its post-occurrence vindication could only take place in a state court, with review in the Supreme Court under 28 U.S. § 1257. Thus in reaching the constitutional issue the *Baker v. McCollan* Court then made a conscious albeit implicit decision that it would not reconsider the *Monroe v. Pape* interpretation of section 1983.

Judge Sloviter states that Justice Rehnquist's distinction between the state of mind required by section 1983 and the state of mind required by the constitution is "enigmatic." Typescript 12, n.3. There is no enigma. Justice Rehnquist was well aware, just as the members of this court are well aware, that some violations of the constitution plainly do require a state of mind -- infliction of punishment in violation of the eighth amendment, for example. Others plainly do not -- violations of the establishment clause of the first amendment, for example. Thus the description of *Baker v. McCollan* as "enigmatic" is no more than an unwarranted effort to disregard the Supreme Court's unadorned refusal in that case to overrule the interpretation of section 1983 which in *Monroe v. Pape* it had unanimously adopted.

Shortly after *Baker v. McCollan* was decided the Supreme Court in *Martinez v. California*, 444 U.S. 277 (1980) considered for the first time a provision of the California Tort Claims Act, on which New Jersey's Act is modeled. The section in question, the equivalent

of which is N.J. Stat. Ann. § 59:5-2 (West 1982), provided that "[n]either a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner . . . ," Cal. Govt. Code Ann. § 845.8(a) (West 1982). Plaintiffs sought recovery in a California State Court for the death of a fifteen year old who had been murdered by a sex offender released on parole five months earlier, allegedly as a result of the negligence of the parole officials. The plaintiffs asserted a claim under section 1983, which the California Court rejected. On appeal, the Supreme Court affirmed. Justice Stevens wrote:

> Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death, see *Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977); *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), we hold that taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.
>
> Her life was taken by the parolee five months after his release. He was in no sense an agent of the parole board. Cf. *Scheuer v. Rhodes*, 416 U.S. 232. Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim has been described as "a species of tort liability," *Imbler v. Pachtman*, 424 U.S. 409, 417, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute.

444 U.S. at 284-85 (footnotes omitted).

The unanimous decision in *Martinez v. California* is significant for this case in two respects. First, it confirms that neither California nor New Jersey can confer an immunity which must be recognized in a section 1983 action, even in a state court. The Court recognizes explicitly that because there is concurrent jurisdiction over section 1983 actions, state courts must entertain them.[22] 444 U.S. at 283 n.7, citing *Testa v. Katt*, 330 U.S. 386, 391 (1947). Second, the opinion, in determining the liability of the parole officers for their *own* actions as distinct from the actions of the murderer, makes a conventional tort law proximate cause analysis. There is no suggestion in *Martinez v. California* that had proximate cause standards been satisfied, the state employees would have been excused from the duty to take reasonable care to prevent foreseeable harm. Indeed the clear implication of Justice Stevens' opinion is that had proximate cause been established between the parole

22. Thus despite any possible implication to the contrary in Judge Garth's opinion, the outcome of this case may well be the same whether Davidson proceeded in a federal or a state forum. The state could eliminate causes of action based on state law, but must entertain section 1983 causes of action.

board's negligence and the death of the victim section 1983 would provide a remedy.

The issue of a state of mind requirement in section 1983 was next addressed in *Parratt v. Taylor*, 451 U.S. 527 (1981). Unlike the federally protected liberty interest in personal security involved *Baker v. McCollan* and in this case, *Parratt* involved a state law property interest. The plaintiff, an inmate of the Nebraska Penal and Correctional Complex, proceeding *pro se* convinced the district court that state officers had negligently deprived him of property. The Court of Appeals for the Eighth Circuit affirmed without opinion, 620 F.2d 307 (1980). Nebraska petitioned for certiorari, and the first question presented in its petition is "[w]hether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. § 1983." *Petition for cert.*, No. 79-1374, filed May 1, 1980 at 2. Nebraska's brief on the merits identifies the same issue as a question presented: "[w]hether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. § 1983." Brief for Petitioner at i, *Parratt*. Point II of Nebraska's brief on the merits is captioned "The Issue of Negligence," *Id.* at 14 and discussion of that issue occupies fifteen pages in a thirty page brief. The American Civil Liberties Union and a variety of *amici* were permitted to file extensive briefs as *amicus curiae* on the issue of whether section 1983 requires a particular state of mind. Since Nebraska sought certiorari in a case in which the respondent was a *pro se* litigant, in which it had to appoint counsel, and in which the Court of Appeals wrote no opinion, it is clear beyond question that the Court deliberately selected *Parratt* for review in order to consider once again whether section 1983 should for the first time be held to embody a state of mind requirement. Justice Rehnquist confirmed that this was the case, observing that the Court had

> twice granted certiorari in cases to decide whether mere negligence will support a claim for relief under § 1983, see *Procunier v. Navarette*, 434 U.S. 555 (1978), and *Baker v. McCollan*, 443 U.S. 137 (1979), [and] in each of those cases found it unnecessary to decide the issue.

451 U.S. at 532. The quoted statement that in *Baker v. McCollan* it was not necessary to decide the issue is hardly consistent with *Hagans v. Lavine*. Be that as it may, in *Parratt* the Court's holding is explicit. Reviewing the legislative history of section 1983 and its prior interpretation by the Court, Justice Rehnquist wrote:

> Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker v. McCollan* we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983 . . . . Section 1983, unlike its criminal counterpart, 18 U.S.C. § 242, has never been found by this Court to contain a state-of-mind requirement. This Court recognized as much in *Monroe v. Pape*, 365 U.S. 167 (1961) . . . .

451 at 534 (footnote omitted). Justice Rehnquist then approvingly quoted Justice Douglas' statement in *Monroe v. Pape* that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Parratt*, 527 U.S. at 535, *quoting* 365 U.S. at 187. He then concluded:

> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a "civil remedy" for

> deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt, 527 U.S. at 535.

Thus unlike the judges who join in Judge Sloviter's opinion, Justice Rehnquist and the Justices joining in his *Parratt v. Taylor* opinion found nothing "enigmatic" in his *Baker v. McCollan* opinion. He read it, as I do, to be consistent with the unanimous interpretation of section 1983 in *Monroe v. Pape*. Moreover he read *Monroe v. Pape* in exactly the same way Judge Biggs read it for this court in *Basista v. Weir*, *supra*.

Only after deciding the issue of statutory interpretation tendered by Nebraska did the *Parratt* Court turn to the alternative constitutional ground of decision: that for the negligent destruction of personal property a post-event tort remedy satisfies due process. That course was consistent with the Court's settled practice. Had section 1983 been interpreted as requiring a particular state of mind, rather than conduct objectively unreasonable in light of the risk of harm, the Court could, and would, have reversed on statutory rather than constitutional grounds. *See, Hagans v. Lavine*, *supra*. Thus the Court's discussion of the statutory issue on which it granted certiorari is unquestionably and unequivocally a holding that a

failure to take reasonable care to avoid an invasion of a constitutionally protected interest is actionable under section 1983. The Court continued:

> Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; *and the alleged loss, even though negligently caused, amounted to a deprivation.*

451 U.S. at 536-37 (footnote omitted) (emphasis added). It was not a deprivation without due process of law, however, but only because Nebraska, unlike New Jersey, preserved the historical liabilities of state employees for their failure to take reasonable care of property which because of their positions came into their possession.

Before a case presenting a *Parratt v. Taylor* issue reached this court the Supreme Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) afforded further guidance with respect to the relationship between state positive law and the due process clause of the fourteenth amendment. *Logan* involved a state-created expectation that physically handicapped persons would not be discriminated against in private employment. In that case state officials in an administrative agency neglected to convene a hearing on the charge of discrimination within the time provided in the antidiscrimination statute, and the Illinois Supreme Court rejected Logan's contention that this neglect violated due process. The Supreme Court, distinguishing *Parratt v. Taylor*, held that the negligent failure to schedule a hearing deprived Logan of a state-created interest without due process. Justice Blackmun wrote:

> Despite appellee Zimmerman Brush Company's arguments, the recent decision in *Parratt v. Taylor*, 451 U.S. 527 (1981) is not to the contrary. There, a state employee *negligently* lost a prisoner's hobby kit; while *the Court concluded that the prisoner had suffered a deprivation of property within the meaning of the Fourteenth Amendment*, it held that all the process due was provided by the State's tort claims procedure.

455 U.S. at 435 (emphasis supplied). Thus the opinion of the Court in *Logan* confirms what is plain in *Parratt*, a negligent deprivation of property by a state officer is a deprivation of property within the meaning of the fourteenth amendment.[23] The *Logan* Court's treatment of *Ingraham v. Wright* is also significant. Justice Blackmun wrote:

> In *Ingraham v. Wright*, 430 U.S. 651 (1971), the Court concluded that state tort remedies provided adequate process for students subjected to corporal punishment in school. In doing so, however, the Court emphasized that the state scheme "*preserved what 'has always been the law of the land.'*" *Id.*, at 679, quoting *United States v. Barnett*, 376 U.S. 681, 692 (1964), and that adding additional safeguards would be unduly burdensome. 430 U.S., at 680-682. Here, neither of those rationales is available. Terminating potentially meritorious claims in a random manner is hardly a practice in line with our common-law traditions.

23. Judge Silverstein mentions *Logan v. Zimmerman Brush Co.*, typescript 30, but her selective quotation unfairly ignores those parts of Justice Blackmun's opinion in which he discusses issues relevant to this case.

455 U.S. at 436 n.10. (emphasis supplied).

Justice Blackmun's reference to preservation of what has always been the law of the land is significant, because until the New Jersey legislature decreed otherwise, it had always been the law of the land that custodians of incarcerated persons had a duty to take reasonable care to prevent third parties from inflicting harm on their charges. The law of the land in that respect is reflected in the rule announced in Restatement (Second) Torts, § 320 (1965):

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or had reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.

Id. Before New Jersey joined California in relieving public employees of their historically recognized duties under the law of the land, the rule announced in Restatement (Second) Torts, § 320 (1965) was the law of that state. *Harris v. State*, 61 N.J. 585, 297 A.2d 561 (1972).[24] The rule in *Logan* states plainly that the

24. The rule is not a recent innovation. Both the black letter and Comments in Restatement (Second) Torts § 320 (1965) are taken verbatim from Restatement (First) Torts § 320 (1934). Comment (a) provides that "[t]he rule stated in this Section is applicable to a sheriff or peace officer, a jailer or warden of a penal

decision in *Ingraham v. Wright* would have been otherwise if Florida in that case had attempted to relieve school officials of the duty of care imposed by the common law.

After *Logan v. Zimmerman Brush Co.* was decided a case presenting operative facts similar to those in *Parratt v. Taylor* was filed in the District of New Jersey. Charles Holman, a prisoner serving a life sentence had attempted to replevy personal property, or to recover its value, in a New Jersey State Court.[15] Without considering any section 1983 claim the state court, relying on N.J. Stat. Ann. 59:5-3 (West 1982) dismissed.[16] The prisoner then commenced a section 1983 action in the federal court, and moved for partial summary judgment challenging the constitutionality of section 59:5-3. Judge Debevoise, in a carefully reasoned opinion which relied on *Parratt* and *Logan*, granted a partial summary judgment, holding that as applied to Holman, section 59:5-3 was unconstitutional, in that it deprived Holman of important interests in property without due process.

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institutions, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lessees of convict labor." *See, e.g. Novakoff v. Genesee Hospital*, 270 A. D. 648 (N.Y. App. Div.), 61 N.Y.S. 2d 832, 836 (1946) affirmed 296 N.Y. 936, 73 N.E.2d 117 (1947) (Section 320 duty of care applies to hospital patients); *Daniels v. Anderson*, 195 Neb. 95, 237 N.W.2d 397, 403 (1975) (Section 320 duty of care obliges jailer to take reasonable care to prevent beating by a fellow inmate).

15. Holman v. Hilton, 542 F.Supp. 913 (D.C. N.J. 1982).

16. That section of the Tort Claims Act prohibits suits by prisoners against any public entity or public employee while the prisoner is confined. That provision is applicable to Davidson, but the provisions referred to in the text would prohibit a suit for the injuries he suffered in this case even after his release.

The trial court certified the case for interlocutory review pursuant to 28 U.S.C. § 1292(b) (1982), and this court, after careful consideration of essentially the same contentions made by New Jersey in the instant appeal, affirmed. Judge Hunter, who today mysteriously joins in Judge Skwiter's opinion, wrote:

> Reading *Parratt* and *Logan* together, it is plain that while *Parratt* may relegate a prisoner to his state tort remedies when such remedies are available, *Logan* provides the framework for analyzing the constitutional adequacy of state procedural limitations on those remedies. Therefore the principles of *Logan* are applicable in cases where it is claimed that the State refuses to make available to a claimant the established state procedures otherwise available for redress of deprivations of property.

Holman v. Hilton, 712 F.2d 854, 858 (3d Cir. 1983). Judge Hunter then proceeded to analyze the effect of N.J. Stat. Ann. 59:5-3 on *Holman*, concluding that while that section of the Tort Claims Act only postponed a lawsuit, tolling the statute of limitations in the meantime, its effect on a prisoner serving a life or long-term sentence was no different, practically, than had the remedy been totally eliminated. 712 F.2d at 859. Since this was so, Holman could bring a section 1983 action for the negligent loss of his property.

The opinions in *Holman v. Hilton* are honest treatments of the Supreme Court case law dealing with the question whether section 1983 includes a state of mind requirement, and they should control the outcome of this case. Judge Skwiter's treatment of the *Holman* precedent is discussed, *infra*.

After our decision in *Holman*, and after the decision of the trial court in this case the Supreme

Court in *Smith v. Wade*, 461 U.S. 30 (1983) confirmed that it meant just what it had said in *Parratt v. Taylor* and *Logan v. Zimmerman Brush Co.*. In *Smith v. Wade*, which also involved a section 1983 suit against prison officials for failing to prevent fellow prisoners from harming an inmate, a jury awarded both compensatory and punitive damages. Because the case had been tried as a violation of the eighth amendment, the court's charge to the jury required a finding of gross negligence. On certiorari the defendants conceded liability for compensatory damages, but contended that punitive damages should not have been awarded absent a finding of intentional misconduct. In light of the concession on liability for compensatory damages the Supreme Court had no occasion to consider whether a gross negligence charge was required in every section 1983 action. Reviewing the case law, however, the court concluded that at common law a finding of "recklessness, serious indifference to or disregard for the rights of others, or even gross negligence" permitted an award of punitive damages. 461 U.S. at 47-48. Justice Brennan continued:

> The remaining question is whether the policies and purposes of § 1983 itself require a departure from the rules of tort common law. As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action.

Id. at 49. Thus the court stated unequivocally that section 1983 permitted all the remedies recognized by the common law of torts. One of those remedies is the recovery of damages for the failure of a custodian to take reasonable care to prevent third parties from

inflicting harm on those in their custody.[27] In light of *Smith v. Wade*, an intermediate appellate court is not free to read into section 1983 a higher standard for tort liability than the common law has historically recognized.

Even while this appeal was pending the Supreme Court reconfirmed that the key factor in *Parratt v. Taylor* was the availability of a state common law tort remedy, following a negligent deprivation of property. *Hudson v. Palmer*, ___ U.S. ___, 104 S.Ct. 3194 (1984). Indeed Chief Justice Burger stated explicitly that *Parratt v. Taylor* "held that a negligent deprivation of property by state officials does not violate the Fourteenth Amendment if an adequate postdeprivation state remedy exists." ___ U.S. at ___, 104 S.Ct. at 3196. In *Hudson* the same rule was applied to intentional deprivations occurring in violations of established state procedures. But the case makes clear that both negligent and intentional deprivations are remediable under section 1983 when, as here, the state has eliminated post-deprivation remedies.

In view of the unbroken line of authorities from *Monroe v. Pape* in 1961 through *Hudson v. Palmer* in 1984 the majority's effort to read into section 1983 a state of mind requirement is utterly untenable.

V.

The Majority's Unprincipled Treatment of Precedent

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27 Even the dissenters in *Smith v. Wade* did not urge that for compensatory damages a different state of mind than failure to take reasonable care was required. They only urged that more than gross negligence or reckless disregard should be required for the award of punitive damages. *Id.* at 56 (Rehnquist, J. dissenting); *Id.* at 94 (O'Connor, J., dissenting).

Judge Skovitz's treatment of precedents that should be regarded as controlling is deeply disturbing; the treatment of *Holman v. Hilton* is particularly so. That decision is mentioned in three contexts.

At one point the majority opinion states that section 1983 "plays an effective role . . . in providing a federal forum to challenge an established state procedure that infringes upon an individual's liberty or property interests, such as . . . the New Jersey statute prohibiting prisoners from bringing tort actions against public entities or employees while confined struck down in *Holman v. Hilton*, 712 F.2d 854 (3d Cir. 1983)." Typescript at 25-26. Why, one must ask, should section 1983 play a less effective role in providing a forum to challenge the far more drastic prohibitions in N.J. Stat. Ann. §§ 59:2-4, 59:5-4, 59:6-2, 59:6-7 and 59:5-2(b)(4)? An answer to that obvious question is attempted:

> In the first place, plaintiff here, unlike the plaintiff in *Holman v. Hilton*, 712 F.2d 854 (3d Cir. 1983), has not challenged the constitutionality of the statute. Plaintiff's claim, instead, is only for money damages from the defendants for the injuries inflicted by the assault.

Typescript at 29. That dissembling description of Davidson's *pro se* pleading -- a complaint comprised of a printed form furnished by the district court in which Davidson, following instructions, filled in the blanks -- is an outrageous violation of the standards announced in *Haines v. Kerner*, 404 U.S. 519 (1972) for measuring the sufficiency of a *pro se* litigant's pleading. It disregards, moreover, the concluding prayer in the complaint for "[a]ny other relief equitable and just that the Court deems just and appropriate."

App. Da 4. Had counsel been appointed in the district court there might be some justification for distinguishing *Holman v. Hilton* by insisting that Davidson had failed to plead his legal theories with sufficient specificity. In fact, however, Davidson proceeded *pro se* throughout the trial, and counsel was appointed for him only in this court. Plainly Judge Brotman who conducted the trial assumed throughout that Davidson was pursuing relief under section 1983 because the Tort Claims Act prohibited him from recovering from Cannon and James under state law. That is the same issue decided in *Holman v. Hilton*, and discussed by the Supreme Court in *Martinez v. California*, 444 U.S. 277, 285 (1980), a case which Judge Brotman cites in his opinion. App. Da 19. The suggestion that the interrelationship between the Tort Claims Act and section 1983 was not presented, and litigated, is an insult to Judge Brotman's considerable intelligence. His own words, quoted in the margin, remove any doubt about the issues which were presented to him, and which he tried.[20]

The heart of the majority opinion, however, is its final "distinction" of *Holman v. Hilton*. Judge Skovitz writes:

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20. Judge Brotman wrote:

> The first step is to inquire whether the assault here implicates a "liberty interest" protected by the due process clause. Freedom from physical attack and injury undeniably falls within the compass of constitutionally protected liberty. To be free of personal violence is the basic core of liberty. "To be free from, and to obtain judicial relief for, unjustified intrusions on personal security . . . [is one of] the historic liberties" protected at common law and by the due process clause. *Ingraham v. Wright*, 430 U.S. 561, 672-73 (1977). *See Youngberg v. Romeo*, 1457 U.S. 307, 102 S.Ct. 2452 (1982). Even while incarcerated, plaintiff enjoys a constitutionally protected interest in conditions of reasonable care and safety.

Defendants emphasize that plaintiff seeks to recover damages for a single attack. They refer to correct statements by the court of appeals that "[t]he right to protection is not activated by an isolated mishap, or called into operation by each bruise that a patient [here, prisoner] may suffer," and that "no one is guaranteed an injury-proof life." *Ramos v. Youngberg*, 644 F.2d 147, 162 (3d Cir. 1980), reversed and remanded, 50 U.S.L.W. 4681 (June 16, 1982). But as defendants have also pointed out, the critical aspect is not the weight of the interest, but its nature. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). Thus the first analytical step is whether security from assault is within the ambit of "liberty." Whether the assault is aggravated or repeated does not alter its nature, but simply its weight.

Furthermore, the instant case is not about a "bruise" or an inadvertent accident. It does not involve some "de minimis" personal injury, but a vicious and traumatic attack inflicting severe wounds. The defendants were personally apprised of the anticipated assault, and knowing of McMillian's violent character, did nothing to prevent the occurrence. Had reasonable precautions been taken, even as simple as issuing a warning to McMillian, the evidence suggests that plaintiff would not have been injured. Defendants knew that McMillian represented a "special danger" to plaintiff. Cf. *Martinez v. California*, 444 U.S. 277, 285 (1980).

* * *

Defendants argue that plaintiff did not enjoy a "liberty interest" in his personal security because defendants did not intentionally permit the assault, but were merely negligent about his safety. This argument reinforces the notion of liberty interest with the notion of deprivation. State of mind has no relevance for purposes of identifying what is a liberty interest and what is not.

Rather, as before defendants' argument as to that state of mind is significant for purposes of determining whether the defendant deprived plaintiff of his liberty. Defendants suggest that unless the actions of the state officials were intentional, reckless, or malicious, there has been no "deprivation" of rights. But as we have discussed in our prior opinion, the Supreme Court has held that a state

> In the second place, a claim for procedural due process must be predicated on deprivation of a substantive right or interest created by the Constitution, a statute or other entitlement . . . . Since we have rejected Davidson's claim that his substantive right under the Fourteenth Amendment was deprived by defendants' negligence, and there has been no claim of a statutory or other entitlement, there is nothing to trigger an inquiry into what process is due.

Typescript at 29. There are two ways in which these obscurant sentences may be read. One possible

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official's negligence is sufficient to constitute a "deprivation" for due process purposes. *Parratt v. Taylor*, 451 U.S. 527 (1981). We do not agree with defendants that *Parratt*'s holding regarding negligent deprivation is irrelevant to the instant case on the ground that *Parratt* involved a property rather than a liberty interest. We do not believe these categories are so rigid. The distinction between property and liberty interests does not alter the relevant reasoning, which is that § 1983 does not include a requirement that the official's act be intentional. Defendants assert that we should impose a "deliberate indifference" standard, borrowed from the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97 (1976). This standard was rejected as inappropriate under due process analysis in *Youngberg v. Romeo*, 1457 U.S. 307, 102 S.Ct. at 2456 n.11.

> Defendants Cannon and James, acting under authority of state law, negligently deprived plaintiff of his liberty interest in remaining free from physical assault. This brings us to the second step of due process analysis, to inquire whether the state has provided for "process" which is due under the circumstances. As we discussed in our prior opinion, New Jersey provides plaintiff no process whatsoever by which to pursue a remedy against the state or state officials for injuries inflicted by another prisoner. N.J. Stat. Ann. 59:5-2 (West 1982).

App. 11a-18-11a-20 (footnote omitted).

reading is that *Hobson v. Hilton* survives, with respect to property interests created by state positive law, but does not apply to loss of life or invasion of bodily security. The other is that the failure to take reasonable care to prevent a loss of property does not amount to a deprivation of property.

If, as I suspect, the first reading is what is intended, then the majority opinion is an example of perverse obverse *Lochnerism*. The fundamental error of *Lochner v. New York*, 198 U.S. 45 (1905) was the Court's attempt to remove contract, which was always a matter of positive property law, from the reach of law by converting contract into a liberty interest. The object, and temporary result, was to preserve the status quo between employers and employees. What the majority is doing is worse. Rather than elevating property interests to the status of liberty interests, it denegrates the latter by holding that they shall receive less protection than has been afforded the former.

If, on the other hand, what is intended is that the negligent destruction of property, absent a state post-destruction remedy, is not a deprivation within the fourteenth amendment, then *Hobson v. Hilton*, announced only 14 months ago, has proved to be "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Of course the Court in banc is free to play fast and loose with its own precedents, however unwise that course may be.

The court in banc is not similarly free, however, to play fast and loose with the Supreme Court's precedents. The cases discussed in Part IV above cannot, consistently with our position as an intermediate court, be given the short shrift treatment reflected in Judge Skwiter's opinion. Moreover cases on which that opinion relies, not discussed in part IV, do not support the reversal of Davidson's judgment. Several of these cases require special mention.

Judge Skwiter quotes *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) in support of the proposition that a state may relieve its agents of the duty to take reasonable care to prevent harm to persons entrusted to their custody. Typescript at 14. Like so much else in her opinion the quotation, taken out of context, is used for a misleading purpose. Unlike the states of New Jersey and California, Texas did not relieve its agents rendering medical care to prisoners of the duty of reasonable care. A post-treatment negligence action was available in the Texas Courts. 429 U.S. at 107 (referring to Tex. Civ. Code Ann. § 6252-19 (Vernon 1970 & Supp. 1984)). An examination of the petition for certiorari discloses quite clearly that it did not present any issue relevant to this case. The petitioners construed the *pro se* complaint as one presenting an eighth amendment claim, and none other. The response to the petition by court appointed counsel and the briefs filed by both sides all proceed on the same assumption. 429 U.S. at 101-02. Nothing was decided in *Estelle v. Gamble* other than that the eighth amendment required a showing of more than negligence. That case cannot be treated as authority for state power to relieve custodians, or even physicians, of the duty to take reasonable care.

Judge Skwiter similarly attempts to wring from *Paul v. Davis*, 424 U.S. 693 (1976) support for the proposition that custodians may be relieved of the obligation to take reasonable care to prevent harm. Typescript at 14. Once again a quotation, taken out of context, is used for a misleading purpose. *Paul v. Davis* holds that absent some expectation created by state law there is no substantive interest to be protected by the due process clause. That holding is in my view unfortunate, since it misses the point that human personality has a psychological as well as a physical component, either of which is susceptible to injury. That notwithstanding, the holding has no

relevance to this case, for here the injury to Davidson was plainly physical. Moreover this court holds unanimously that entirely aside from state positive law there is a liberty interest in personal security from physical injury. Thus Judge Sloviter's reliance on *Paul v. Davis* in Part IV of her opinion is inconsistent with the analysis made in Part III, to which the entire court joins.

Judge Sloviter also opines that the court's "holding avoids the anomalies that would result . . . were a prisoner to be entitled under the Constitution to a higher standard of care than an involuntarily committed mental patient, *see Youngberg v. Romeo*, 457 U.S. 307 (1982)." Typescript 20 n.9. Plainly, then, the majority assumes that New Jersey can, as it has done, validly relieve custodians of the mentally ill and the mentally retarded of the duty to take reasonable care to prevent harm from befalling those unfortunates. *Youngberg v. Romeo* announced no such sanctioned doctrine. As Part III of the majority opinion concedes, *Romeo* recognizes a liberty interest in freedom from bodily harm. In determining the standard of care appropriate for the protection of that interest, the Supreme Court adopted the standard proposed by Chief Judge Seitz in this Court: the exercise of accepted professional judgment. 457 U.S. at 321, 323. That standard is the standard of the common law. Moreover it is precisely the standard from which Cannon and James departed. They failed to discharge their duties as professional custodians of prisoners in accordance with the accepted standards of that calling. The trial court so found, and this court agrees, unanimously, that this finding is not clearly erroneous. Judge Sloviter's treatment of *Youngberg v. Romeo* is nothing less than a backhanded rejection of the standard of care which it announced. This development bodes ill not only for prisoners but also for

the involuntarily committed everywhere in this circuit.

Finally, Judge Sloviter's oblique suggestion that the "conduct that shocks the conscience" language in *Rochin v. California*, 342 U.S. 165, 172 (1952) establishes the standard of liability for section 1983 cases, because "[t]he Court did not say whether anything less would suffice," Typescript at 27, is irresponsible. That case was a direct criminal appeal involving the issue whether evidence obtained by use of a stomach pump could be admitted in a criminal trial. Justice Frankfurther wrote:

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.
>
> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.

Id. (citation omitted). The suggestion that the descriptive phrase in the last quoted sentence defined, for Justice Frankfurter, or any other Justice, the maximum content of the due process clause in a

process liberty content, is simply preposterous. Even if this untenable suggestion were to be adopted as the relevant standard, New Jersey's statutory abrogations of the duty of custodians to take reasonable care to prevent harm from befalling those it has incarcerated may not absorb the majority's concurrence, but it surely shrinks mine.

VI.

The Absence of Cerebral Penalties

Some of those joining in the majority opinion are engaged, one suspects, in a quixotical quest for devices which will make our burgeoning caseload disappear.[29] The gross negligence standard which has been adopted by the majority as the due process minimum will afford no relief in this respect. The pleadings in this case illustrate the problem perfectly. The complaint was made on the district court's printed form, tailored for prisoners' use. In Part IV of the form, captioned "Statement of Claim" the *pro se* litigant is instructed:

> State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes.

App. Da 3. (emphasis in original). The instructions are consistent with the pleading standards announced in *Haines v. Kerner*, 404 U.S. 519 (1972) and *Conley v. Gibson*, 355 U.S. 41 (1957). Davidson followed them, by simply stating what transpired. He did not mention any standard of care. The court could not on the basis of his statement of claim rule as a matter of law that he would be unable to establish gross negligence. Moreover even if the majority were to impose a

29. See note 19 *infra*.

requirement that those magic words be included, they would soon appear in every *pro se* or counseled complaint seeking money damages.

Moreover, even at trial the distinction between gross negligence and failure to take reasonable care under the circumstances is not one that is susceptible of applications as a matter of law.

> The prevailing view is that there are no "degrees" of care or negligence, as a matter of law; there are only different amounts of care as a matter of fact, and "gross" negligence is merely the same thing as ordinary negligence, "with the addition," as Baron Rolfe once put it, "of a vituperative epithet."

W. Prosser, Handbook of the Law of Torts, 182 (4th ed. 1971) (footnotes omitted). In every case the facts still will have to be developed, and the case will be rare, indeed, when a trial court will discern a line between "gross" and "mere" negligence clear enough to grant a summary judgment or to direct a verdict which would not otherwise have been granted.

VII.

The Necessity of a Remand

What I have said about the fact-sensitive distinction between the pejorative "gross" negligence and the equally pejorative "mere" negligence suggests that even on the majority's analysis the proper result should be a remand. Obviously Davidson, a *pro se* litigant, was unaware of the metaphysical distinction which the majority has invented. Moreover Judge Bretman, because he relied on the plain statement in *Parratt v. Taylor* that negligence suffices, did not consider whether the conduct of Cannon and James amounted to gross negligence. The case was tried non-jury. The trial court heard the testimony and saw

No. 84-5872 (1)

Office-Supreme Court, U.S.
FILED
MAR 19 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROY E. DANIELS, PETITIONER,

v.

ANDREW WILLIAMS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 6, 1984
CERTIORARI GRANTED FEBRUARY 19, 1985

BEST AVAILABLE COPY

55 pp

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

DOCKET ENTRIES

ROY E. DANIELS, PLAINTIFF

v.

ANDREW WILLIAMS, RESPONDENT

1982		
Feb. 22	1	ORDERED that the complaint be filed IFP; deft file his response within 20 days; pltf. is granted 20 days after receipt of deft's response within which to file his rebuttal, ENT 02-22-82, RLW, filed. Copies mailed. lcq
Feb. 22	2	Complaint filed. lcq
Feb. 22	—	Consent forms mailed. lcq
Feb. 22	—	Summons issued. lcq
March 3	—	Marshal's return on executed summonses, filed. kfm
March 17	3	Deft's Answer, filed. kfm
March 17	—	Deft's *Consent* to Juris. of the Mag., filed. (Appeal to USDC) kfm
April 9	4	Deft's Motion for Summary Judgment, filed. lcq
April 19	5	ORDERED that pltf may, if he so desires, respond to def's motion for summary judgment within 20 days, entered 4/19/82 RLW, filed. Copies mailed. kfm
April 28	6	Pltf's Affidavit, filed. lcq
Aug. 2	7	MEMORANDUM of the Court, filed. kfm
Aug. 2	8	ORDER DISMISSING the complaint and enters judgment for the defts; pltf advised of his right to appeal, entered 8/2/82 RLW, filed. Copies mailed. kmf

Aug. 23	9	Pltf's Notice of Appeal, filed.	kmf
	10	Docket entries	
	11	Clerk's certificate	

Supreme Court of the United States

No. 84-5872

ROY E. DANIELS, PETITIONER,

v.

ANDREW WILLIAMS

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

FEBRUARY 19, 1985

Justice Powell took no part in the consideration or decision of this petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

ORDER

Upon consideration of the plaintiff's application to proceed *in forma pauperis*, his proof of poverty, and the complaint annexed, the court ORDERS that:

(1) the complaint be filed *in forma pauperis;*

(2) the defendant file his response pleading within 20 days of the receipt of this order;

(3) the plaintiff is reminded of Rule 5 of the Federal Rules of Civil Procedure, which requires that every pleading or other notice after the complaint be served on all parties by mailing it to each party's attorney;

(4) the plaintiff is granted 20 days from receipt of a copy of the defendant's answer and other responsive pleadings within which to file opposing affidavits or other appropriate material, if he wishes to do so. Failure to respond may result in the entry of judgment against plaintiff on the basis of the defendant's responsive pleadings.

Let the Clerk issue process to the defendant. A copy of this order also shall be sent to the plaintiff.

/S/ Richard L. Williams
RICHARD L. WILLIAMS
United States District Judge

Date: FEBRUARY 22, 1982

UNDER CIVIL RIGHTS ACT 42 U.S.C. §1983

NAME: ROY E. DANIELS

PRISONER NUMBER: 26825

PLACE OF CONFINEMENT: Richmond City Jail-F3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Case No. 82-10106-R

ROY E. DANIELS, PLAINTIFF

v.

DEPUTY ANDREW WILLIAMS
RICHMOND SHERIFF DEPARTMENT, DEFENDANT

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes ____ No ###

B. If your answer to A is yes, describe the action in the spaces below. (If more than one action describe the additional actions on the reverse side of this page).

1. Parties to the action: _____

2. Court (if a federal court, name the district; if a state court, name the city or county): _____

3. Docket number: _____

4. Name of judge to whom case was assigned: _____

5. Disposition (for example: Is the case still pending? If not what was the ruling? Was the case appealed? If so, what was the disposition?) _____

C. Did you present the facts relating to your complaint in the state prison grievance procedure?

Yes ### No.___

1. If your answer is yes, what was the result?

No Redress

2. If your answer is no, explain.

D. Statement of Claim:

State here briefly the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of different claims, number and set forth each claim in a separate paragraph. Use as much space as you need; attach extra pages if necessary.

Claim #1.

Supporting FACTS (tell your story briefly without citing cases or law):

On Saturday, January 23, 1982, I was going down the steps to my building to breakfast. As I was walking down the stairs, I slip on a pillow that left on the stairs by the Deputy of the building, (Deputy Andrew Williams, and injured my back and ankle. I was seen by the Doctor, and he prescribed

(Con't. on Claim #2)

Claim #2:

Supporting FACTS (tell your story briefly without citing cases or law):

rest and aspirins, but I am suffering from back pains still.

Claim #3:

Supporting FACTS (tell your story briefly without citing cases or law):

E. State what relief you seek from the Court. Make no legal arguments; do not cite cases or statutes:

I seek monetary and punitive damages of $25,000.00.

Forma Pauperis Affidavit

I hereby apply for leave to proceed with this complaint without prepayment of fees or costs or giving security therefor. In support of my application, I state under oath that the following facts are true:

(1) I am the plaintiff in this complaint, and I believe that I am entitled to redress.

(2) I am unable to repay the costs of said action, or give security therefor, because:

I am a pauper.

(3) I have no assets or funds which could be used to prepay the fees or costs except

None

(Write "none" above if you have nothing; otherwise, list your assets)

/S/

(signature of plaintiff)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF VIRGINIA
Richmond Division

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT

ANSWER

Comes now the defendant, by counsel, who in Answer to the Complaint of the plaintiff filed herein, doth say as follows:

1. He denies that he is indebted to the plaintiff for the reasons set forth in the Complaint or for any other reasons, and denies the plaintiff is entitled to the relief sought.

2. The defendant denies the characterization contained in the Complaint as the plaintiff seeking injunctive and declaratory relief, and monetary damages from the defendant for an alleged violation of the Eighth Amendment. He denies further that the plaintiff is entitled to any relief against him.

3. The defendant admits that 28 U.S.C. Section 1343 (3) and (4), and 28 U.S.C. Section 2201 and 2202 grant jurisdiction in civil rights actions; however, he denies that such an action is present in this Complaint.

DEFENSES

Comes now the defendant, by counsel, and submits the following defenses to the Complaint filed herein by the plaintiff:

1. The defendant has at all times acted in conformity with the Constitution and laws of the United States and of the Commonwealth of Virginia, scrupulously preserving to the plaintiff all rights, privileges and immunities guaranteed to him by the Constitution and laws of the United States and the Commonwealth of Virginia.

2. The defendant denies that any and all actions were taken maliciously against the plaintiff, but allege that all actions that were taken were taken by him in good faith, and under a reasonable belief of the necessity of such actions and the manner in which they were, in fact, carried out.

3. The defendant further states that to the extent that his actions or inactions are relevant to the Complaint filed herein, he has acted reasonably, without malice toward the plaintiff, and on the basis of a good faith belief, which was reasonable in view of all the known facts, that his actions were appropriate, lawful and in fulfillment of his responsibilities.

4. The defendant further states that he is a Constitutional officer of the Commonwealth of Virginia under Article VII, Section 4, of the Constitution of Virginia, which bars the claim and/or causes of action by virtue of the doctrine of sovereign or governmental immunity.

5. The defendant says that as a governmental official performing discretionary acts in relation to the Complaint filed herein and acting within the scope of his authority, he is immune from liability for the consequences of his actions.

6. The defendant expressly denies each and every allegation contained in the Complaint which is not specifically admitted to herein.

7. The defendant says that any conditions complained of by the plaintiff were due to the acts or omissions of others, negligent or otherwise, over whom your defendant exercises no control and for whose actions he is not responsible for at law.

8. The defendant specifically denies that the plaintiff is entitled to damages or injunctive and declaratory relief as requested in the prayer for relief and further denies that the Complaint filed herein states any claim upon which relief can be granted under 43 U.S.C. § 1983.

9. The defendant alleges that he will rely upon all defenses lawfully available to him at the trial of this matter.

10. The defendant hereby consents to exercise of jurisdiction in this civil action by a duly designated U.S. Magistrate pursuant to 28 U.S.C. Section 636 (c) (1), to the full extent permitted in said statute.

11. The defendant further elects appeal to the District Judge with further review by the Fourth Circuit Court of Appeals upon petition for leave to appeal (28 U.S.C. Section 636 (c) (4) and (5)).

WHEREFORE, the defendant requests that the Court deny in all respects each and every prayer for relief contained in the Complaint by the plaintiff and enter judgment in favor of the defendant.

Respectfully submitted,

ANDREW WILLIAMS, Deputy
By James W. Hopper

JAMES W. HOPPER
Of Counsel

JAMES W. HOPPER, p.d..
BAUGH, HORWITZ & HOPPER
1518 Willow Lawn Drive
Suite 100
Richmond, Virginia 23230

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Virginia

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, by counsel, pursuant to Rule 56, Fed. R. Civ. P., and moves this Court for summary judgment to the Complaint filed herein by reason of the following:

1. The defendant submits herewith as Exhibit I his affidavit and as Exhibit II, with enclosures, the affidavit of Nan F. Dean, and respectfully moves this Court to accept the same as evidence in support of this motion. The plaintiff has alleged that he slipped on a pillow left on the stairs by the defendant causing him to fall and injure his back and ankle. For this alleged negligence of the defendant, the plaintiff seeks damages in the amount of $25,000.

2. This defendant submits that he did not leave a pillow on the stairs of the building to which the plaintiff was assigned on January 23, 1982. Furthermore, this defendant stood at the top of the stairs of the building and observed all inmates from the plaintiff's tier proceed down the stairs and into the common hallway. None of the inmates, including the plaintiff, from this tier fell on the steps at that time. (See Exhibit I hereto).

3. This defendant says further that the plaintiff's medical records reflect that approximately 8:15 a.m. on January 23, the plaintiff reported to the jail infirmary complaining of lower lumbar back pains and abrasion on his right ankle as a result of a fall on the stairs in his building. Furthermore, the plaintiff's medical records reflect that he was examined at approximately 1:00 p.m. on that afternoon concerning his

complaint of having fallen on the steps. Finally, the plaintiff's medical records reveal that he has received continuous treatment for these and other complaints while incarcerated at the Richmond City Jail. (See Exhibit II hereto, with enclosures).

4. This defendant respectfully submits that the plaintiff has failed to state a claim of constitutional magnitude. The plaintiff's complaint alleges facts which may state a common law action of negligence for conditions which may have given rise to his alleged injury. It should be noted, however, that § 1983 does not provide a remedy for common law torts. Instead, it creates a federal cause of action against those acting under color of state law to cause a "deprivation of right, privileges, or immunities secured by the Constitution and laws (of the United States)." 42 U.S.C. § 1983. In many cases, the same conduct *may* violate both state law and the federal Constitution, but certainly not all violations of state law rise to the level of a constitutional tort. *See Street* v. *Surdyke*, 492 F.2d 368 (1974),and cases cited therein. This Court has ruled that simple negligence in maintaining prison conditions does not qualify as a due process deprivation in light of its interpretation of the case *Parratt* v. *Taylor*, 101 S.Ct. 1908 (1981). *See Lewis* v. *Hutto, et al.*, CA No. 81-0894-R, Judge Williams (E. D. of Va. January 18, 1982). According, this defendant respectfully submits that this plaintiff has failed to state a claim of constitutional magnitude or a claim upon which relief may be granted in this matter.

WHEREFORE, for the reasons stated above, this defendant respectfully submits that this Court should deny and dismiss the plaintiff's claim herein and enter judgment on his behalf.

Respectfully submitted,

ANDREW WILLIAMS

By James W. Hopper
Counsel

JAMES W. HOPPER, p.d. counsel
BAUGH, HORWITZ & HOPPER
P.O. Box 11435
Richmond, VA 23230

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Virginia

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA,
CITY OF RICHMOND, to-wit:

The affiant, Andrew Williams, first being duly sworn, states that he is a Deputy Sheriff for the City of Richmond employed as a correctional deputy at the Richmond City Jail, has been such during all times mentioned herein, and as such, is competent to make this affidavit.

Affiant further states that he makes this affidavit based upon his own personal knowledge.

Affiant further states that he is familiar with inmate Roy E. Daniels. During all times mentioned herein, inmate Daniels was housed on tier F-3, which is the third floor of the misdemeanant Building (F). On January 23, 1982, affiant followed his normal procedure of opening the gate onto tier F-3 so as to permit the inmates housed therein to exit the tier and proceed down the stairs to go into the common hallway leading into the inmate dining facility. Affiant stood at the top of the stairs and observed the inmates as they proceeded from the dormitory and down the stairs. At no time did any inmate assigned to tier F-3 fall while proceeding down the

stairs and into the common hallway. Therefore, inmate Daniels did not fall down the stairs leading from tier F-3 on January 23, 1982.

/s/ Andrew Walter Williams III
ANDREW WILLIAMS

Sworn and subscribed to before me, a Notary Public in and for the jurisdiction aforesaid, on this 8th day of April, 1982, by Andrew Williams.

Notary Public

My commission expires: April 25, 1985

EXHIBIT II

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Virginia

Civil Action No. 82-0106R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA,
CITY OF RICHMOND, to-wit:

The affiant, Nan E. Dean, first being duly sworn, states that she is the medical administrator at the Richmond City Jail responsible for, among other things, the maintenance of all medical records of inmates incarcerated at the Richmond City Jail, has been such at all times mentioned herein, and as such is competent to make this affidavit.

Affiant further states that she has reviewed the medical records of inmate Roy E. Daniels maintained by her office during the regular and ordinary course of business, and makes this affidavit based upon her own personal knowledge after her review of said records.

Affiant further states that the medical records maintained at her office during the regular and ordinary course of business are attached hereto and specifically incorporated by reference as follows: Enclosure A, nurses notes and Enclosure B, doctors' notes and emergency room records from the Medical College of Virginia.

Affiant further states that inmate Daniels Medical records reflect that at 8:15 a.m. on January 23, 1982, he was examined by A.W. Hous, R.N. at the Richmond City Jail infirmary for complaints of back and ankle pain following a fall on steps. Inmate Daniels medical records reflect that he was referred to Dr. Mainfort that morning for further evaluation. (See Enclosure A-7). Inmate Daniels' medical records reflect

that Dr. Mainfort examined him at 1:00 p.m. on January 23, 1982, and prescribed bed rest and aspirin. (See Enclosure B-6).

/S/ Nan F. Dean
NAN F. DEAN

[HANDWRITTEN MEDICAL RECORDS
OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA,
CITY OF RICHMOND,

On the date in question, while incarcerated at the (RICHMOND CITY JAIL) i was going to chow on January, 23rd 1982 I was the frist one to go down the stairs, Behind me was JOEY CONNELY and ROBERT CLARK, When i got about half way down the stairs, between F2 and F3, I slipped down on a pillow, That was on some news papers, and hit my BACK and ANKLE,

The inmates on F2 saw what happen including MICHAEL NEWS I asked them who left the pillow on the steps, they (inmates) said DEPUTY, WILLIAMS, He (DEPUTY WILLIAMS) was not around at the time of my fall, So i went to the DOCTOR in the messhall and told him what had happened, He said there was no one the infirmary to check me at the time, but would send for me later.

As i was going back to my building, i saw (DEPUTY WILLIAMS) in the hall way leaning against the bars, i asked him if he had left the pillow on the steps he said YES, I told him i had slipped down on the pillow, he neaver said anything else.

I went back to my tier awaiting for the doctor to call me, And my BACK AND NECK began to hurt, i could not stand the pain, So i asked the DEPUTY to let me go to the INFIRMARY to see the doctor.

There are two (2) more witnesses but i can;t get in touch with but one of them, One is at the (RICHMOND, CITY JAIL) the other one is at the (STATE FARM) The one presently in touch is (MICHAEL NEWS).

I am no longer at the (RICHMOND, CITY JAIL) I am now housed at the (VIRGINIA STATE PENITENTIARY) in B-BASEMENT LOCK UP IN CELL #2. I left the jail 4-9-82 received your letter on 4-28-82. If there is any problem concerning WITNESSES, You may contact (ROBERT CLARK) by way of (RICHMOND, CITY JAIL) (JOEY CONNELY) HAS BEEN TRANSFERRED SINCE January.

I REMAIN
/S/ Roy E. Daniels
ROY E. DANIELS

Witnessed by
/S/ Michael J. News
MICHAEL NEWS

Dated: APRIL 26, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

MEMORANDUM OPINION

Plaintiff Roy E. Daniels is an inmate at the Richmond City Jail. He has filed a section 1983 action against Andrew Williams, a correctional deputy stationed at the jail. *See* 42 U.S.C. § 1983 (1976). The plaintiff seeks to recover damages for back and ankle injuries allegedly sustained when he fell on a prison stairway. Daniels asserts that he slipped on a pillow that Williams negligently left on the stairs. The defendant moves for summary judgment on the plaintiff's claim. *See* Fed. R. Civ. P. 56(b).

The court grants the defendant's motion for summary judgment, because the complaint does not state a valid section 1983 claim. Daniels' allegations amount to no more than a simple negligence claim. This claim does not implicate any substantive constitutional guarantees. The plaintiff instead must rely on the contention that the defendant denied him procedural due process.

Under *Parratt* v. *Taylor*, 451 U.S. 527 (1981), procedural due process requires only a meaningful postdeprivation remedy, unless the deprivation in question was pursuant to an established state procedure. *See id.* at 541. The *Parratt* decision dealt only with negligent property deprivations. *See id.* at 536-37. The court, however, holds that *Parratt* also applies to nonproperty deprivations such as the personal injury alleged here. *See id.* at 541; *Rutledge* v. *Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3998.23 (July 2, 1982); *Irshad* v.

Spann, Civil No. 81-0456-R, slip op. at 6 n.1 (E.D. Va. July 19, 1982); *Frazier* v. *Collins*, 538 F. Supp. 603, 607 (E.D. Va. 1982).

The official misconduct for which Daniels seeks redress was an isolated action in violation of state procedure. The due process clause, therefore, requires only a meaningful post deprivation remedy. *See Parratt* v. *Taylor*, 451 U.S. at 541; *Irshad* v. *Spann*, Civil No. 81-0456-R, slip op. at 5-6. Virginia law provides such a remedy in the form of a common-law negligence action. *See id.* at 7-10. Thus, the defendant's conduct did not violate the plaintiff's due process rights.

For these reasons, the court holds that Daniels' claim is not actionable under section 1983. The court, therefore, must dismiss his action.

/S/ Richard L. Williams
RICHARD L. WILLIAMS
United States District Judge

Date: AUGUST 2, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 82-0106-R

ROY E. DANIELS, PLAINTIFF,

v.

ANDREW WILLIAMS, DEPUTY, DEFENDANT.

ORDER

In accordance with the accompanying memorandum, the court DISMISSES the complaint and enters judgment for the defendants.

Should the plaintiff desire to appeal, written notice must be filed with the Clerk of the Court within 30 days of this date.

Let the Clerk send copies of this order and memorandum to the plaintiff and to counsel for the defendants. The Clerk also shall send both parties a copy of the court's recent opinion in *Irshad* v. *Spann*, Civil No. 81-0456-R (E.D. Va. July 19, 1982).

/S/ Richard L. Williams
RICHARD L. WILLIAMS
United States District Judge

Date: AUGUST 2, 1982

UNITED STATES COURT OF APPPEALS
FOR THE FOURTH CIRCUIT

No. 82-6538

ROY E. DANIELS, APPELLANT

v.

ANDREW WILLIAMS, DEPUTY, APPELLEE.

Argued May 13, 1983.
Decided Aug. 24, 1983.

---

720 F.2d 792

Louis James Licata, Third Year Law Student (Professor ephen A. Saltzburg, University of Virginia Law School, harlottesville, Va., on brief), for appellant.

Dennis A. Barbour, Roanoke, Va. (James W. Hopper, ardner, Moss, Brown & Hopper, P.C., Roanoke, Va., on rief), for appellee.

Before HALL and SPROUSE, *Circuit Judges*, and TURK,* *Chief Judge.***

TURK, *Chief Judge:*

Roy E. Daniels (Daniels), an inmate at the Richmond City Jail, brought this section 1983 action against Deputy-Sheriff Andrew Williams (Williams) alleging that he was injured when he slipped and fell on a pillow negligently left on the stairs by Williams. The district court granted Williams's motion for summary judgment, reasoning that under *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), Daniels's allegations failed to state a procedural due process claim because Virginia provided a meaningful postdepriva-

---

* Honorable James C. Turk, Chief United States District Judge for the Western District of Virginia, sitting by designation.

** Judge Sprouse was not present during oral argument; however, counsel agreed that he could participate by listening to the tapes.

tion remedy in the form of a common law negligence action. Daniels appeals on the grounds that *Parratt's* analysis concerning the adequacy of a postdeprivation remedy should not be applied to the deprivation of a nonproperty interest, and, even if it does apply, that the Virginia doctrine of sovereign immunity denies him an adequate postdeprivation remedy. We affirm the district court's dismissal of Daniels's action.

A.

The plaintiff in *Parratt* alleged that he was deprived of property without due process of law when prison officials negligently lost his hobby kit. The Court agreed that the plaintiff had been deprived-of property within the meaning of the fourteenth amendment. *Id.* at 536-537, 101 S.Ct. at 1913-1914. The Court held, however, that the plaintiff had not stated a claim for a violation of the due process clause of the fourteenth amendment. Rejecting the proposition that due process always requires a hearing before the initial property deprivation, Justice Rehnquist stated in a plurality opinion that a meaningful postdeprivation hearing satisfies the requirements of procedural due process in situations where the property deprivation does not result from established state procedure and the state cannot practically provide a meaningful deprivation hearing. *Id.* at 540-541, 101 S.Ct. at 1915-1916. Applying this principle to the plaintiff's allegation that he was tortiously deprived of his property as a result of a state employee's random and unauthorized act, the Court concluded that the plaintiff was not deprived of property without due process of law because the state's statutory tort procedure provided him with a postdeprivation remedy that satisfied the requirements of procedural due process.[1] *Id.* at 543-544, 101 S.Ct. at 1916-1917.

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[1] Exhaustion of state judicial or administrative remedies is not a prerequisite to section 1983 actions, *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), except for those cases falling under the narrow exhaustion scheme embodied in 42 U.S.C. § 1997. *See Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). *Parratt* does not change this rule. An exhaustion requirement would merely require a plaintiff to exhaust his state remedies before bringing a section 1983 action in federal court. *Parratt*, by contrast, stands for the proposition that a plaintiff may sue only in state court if he fails to state a procedural due process claim under section 1983. Un-

Like the plaintiff in *Parratt*, Daniels alleges that he was injured by the negligence of a state employee. Unlike in *Parratt*, Daniels's claim is for bodily injury rather than for the loss of personal property. "Liberty" within the meaning of the fourteenth amendment includes the right to be free from "unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977). Bodily injury resulting from a state official's negligence therefore deprives a person of a liberty interest protected by the fourteenth amendment.[2] This case thus presents the question whether the *Parratt* analysis applies to nonproperty deprivations, such as a negligent deprivation of a liberty interest.

Parratt concerned a property interest; its scope, however, "cannot easily be limited to negligent deprivations of property." *Palmer v. Hudson*, 697 F.2d 1220, 1222 (4th Cir.1983), *cert. granted*, ___ U.S. ___, 103 S.Ct. 3535, 77 L.Ed.2d 1386 (1983). Because *Parratt's* underlying principle is that a postdeprivation hearing will satisfy procedural due process when there is no practical way to provide a predeprivation hearing, logic dictates that *Parratt* should also apply to a nonproperty deprivation for which a deprivation hearing was impractical. Justice Rehnquist made no distinction in *Parratt* between property and nonproperty deprivations. Rather, the relevant distinction is between isolated acts of misconduct which are not amenable to prior control and deprivations resulting from established state procedure; this factor determines whether a meaningful postdeprivation remedy will satisfy the requirements of procedural due process.

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like an exhaustion requirement, which is based upon principles of comity, the *Parratt* analysis is based upon the concept that there is no constitutional violation if a plaintiff has not been deprived of a protected interest without due process of law.

[2] Some bodily injuries also implicate a protected property interest, as is recognized by the existence of a common law tort action to recover damages for negligently caused personal injuries. However, because *Parratt* expressly applies to negligent property deprivations, our analysis will focus on Daniels' claim that he was deprived of liberty without procedural due process.

In addition, application of *Parratt* to nonproperty deprivations such as Daniels's alleged bodily injury is consistent with the Court's stated goal in *Parratt* to provide courts with assistance in determining "the correct manner in which to analyze claims . . . which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts, but instead are couched in terms of constitutional deprivation and relief is sought under § 1983." *Id.* 451 U.S. at 533, 101 S.Ct. at 1912.

The conclusion that *Parratt* was intended to apply to all types of deprivations resulting from the unauthorized acts of state officials which are not amenable to prior review is further reinforced by the concurring opinion of Justice Powell. Justice Powell argued that the alleged negligent loss of the plaintiff 's property by the state officials did not constitute a deprivation of property within the meaning of the fourteenth amendment. *Id.* at 546, 101 S.Ct. at 1918. And he criticized the Court's focus on the adequacy of the postdeprivation remedy because such would make the fourteenth amendment a font of tort law whenever a state failed to provide a remedy. *Id.* at 550, 101 S.Ct. at 1920. In so doing, however, he recognized that the Court's analysis applies to "negligent invasions of liberty or property interests." *Id.*

Moreover, *Ingraham v. Wright*, *supra*, is cited by the Court as being consistent with the approach taken in *Parratt*. 451 U.S. at 542 and 547, n.1, 101 S.Ct. at 1916 and 1919, n.1 (Powell, J., concurring in result). In *Ingraham*, the Court addressed the claim that corporal punishment in public schools violated due process. *See* 430 U.S. at 653, 97 S.Ct. at 1403. The Court held that corporal punishment in public schools did not deprive school children of liberty without due process of law because, among other things, "the traditional common-law remedies are fully adequate to afford due process." *Id.* at 672, 97 S.Ct. at 1413. *Parratt's* citation of *Ingraham* with approval is compelling evidence that the Court intended the *Parratt* analysis to apply to deprivations of liberty interests.

Not all the justices who joined in the Court's decision in *Parratt* believed that it applied to nonproperty deprivations. Justice Blackmun, with whom Justice White concurred, did

"not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty." 451 U.S. at 545, 101 S.Ct. at 1918. But Justices Blackmun and White offered no persuasive reason for their distinction between property and nonproperty deprivations. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), cited as different yet analogous precedent supporting this distinction, concerned a substantive due process claim, *see id.* at 502-03, 97 S.Ct. at 1937-38, and thus is distinguishable from cases, such as this one, involving alleged procedural due process violations.

Although Daniels concedes that not every liberty deprivation by a state official should be redressed by an action under section 1983, he stresses that the state has an affirmative duty to protect inmates because of the high level of state control in the prison environment. And he argues that *Parratt's* analysis should not apply to this case because a section 1983 remedy is the only way to ensure the state's compliance with this duty. We believe, however, that the Virginia courts are no less diligent than the federal courts in protecting inmates from state inflicted harm. Moreover, there is nothing in *Parratt* which lends support to the proposition that its rationale applies differently to prisoners than to nonprisoners. Indeed, the fact that the plaintiff in *Parratt* was himself an inmate militates against the adoption of Daniels's proffered distinction.

Therefore, we hold that the *Parratt* analysis applies to deprivations of nonproperty interests which do not violate substantive constitutional rights, including negligent deprivations of the liberty interest in freedom from bodily injury. *See Ellis v. Hamilton*, 669 F.2d 510 (7th Cir.), *cert. denied*, ___ U.S. ___, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, ___ U.S. ___, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983).[3]

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[3] *See also Hickman v. Hudson*, 557 F.Supp.1341 (W.D.Va.1983); *Juncker v. Tinney*, 549 F.Supp.574 (D.Md.1982); *Holmes v. Wampler*, 546 F.Supp. 500 (E.D.Va.1982); *Henderson v. Counts*, 544 F.Supp.149 (E.D.Va.1982); *Peery v. Davis*, 524 F.Supp. 107 (E.D.Va.1981); *Eberle v. Baumfalk*, 524 F.Supp. 515 (N.D.Ill.1981); *Meshkov v. Abington Township*, 517 F. Supp. 1280 (E.D.Pa.1981); *but see Howse v. DeBerry Correc-*

Daniels alleges that Williams's negligence in leaving a pillow on the stairs deprived him of a liberty interest. There is no allegation that Daniels was injured as a result of some established state procedure. Nor was it possible for the state to provide a predeprivation hearing since the state could not predict when the alleged loss would occur. Consequently, *Parratt* applies to this case.

B.

Having decided that *Parratt* applies to this case, we must next determine whether Daniels has been deprived of liberty without due process of law. This in turn requires an evalua-

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tional Institute, 537 F.Supp.1177 (M.D.Tenn.1982); *Haygood v. Younger*, 527 F.Supp. 808 (E.D.Cal.1981).

We emphasize that our holding today is not intended to expand *Parratt's* scope to every section 1983 action which resembles a state tort action. *Parratt* applies to only procedural due process claims involving deprivations that do not result from established state procedures and for which the state cannot practically provide a deprivation hearing. Section 1983 still provides a remedy for procedural due process violations resulting from some established state procedure or for which a prior hearing is practical, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-437, 102 S.Ct. 1148, 1157-1158, 71 L.Ed.2d 265 (1982), and for violations of substantive constitutional rights. *See Palmer*, 697 F.2d at 1222, n.2. For example, *Parratt* is inapplicable to eighth amendment claims arising out of a state official's medical malpractice or negligence which amounts to deliberate indifference to serious health and safety needs of prisoners. *See generally Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Withers v. Levine*, 651 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980). Similarly, *Parratt* would not apply to substantive due process violations resulting from a police officer's unjustified, brutal beating of a suspect, *see Henderson v. Counts*, 544 F.Supp. at 152-153, or grossly negligent shooting of a suspect which amounts to a "raw abuse of power." *Jenkins v. Averett*, 424 F.2d 1228, 1232 (4th Cir.1970). In these kinds of cases involving alleged violations of substantive constitutional rights, therefore, the presence or absence of a state remedy is irrelevant to whether a claim is stated under section 1983. Consequently, before dismissing a section 1983 action under *Parratt*, a court should scrutinize the complaint to ensure that it does not include allegations of violations of substantive constitutional rights in addition to an allegation of a procedural due process violation. *See generally Hickman v. Hudson*, *supra*; *Juncker v. Tinney*, *supra*; *Holmes v. Wampler*, *supra*; *Henderson v. Counts*, *supra*.

tion of whether Virginia law provides him with a meaningful postdeprivation remedy.

Virginia law provides Daniels with a common law action for negligence.[4] Nevertheless, Daniels strenously argues that the Virginia doctrine of sovereign immunity denies him an adequate postdeprivation remedy. *See Subica v. Hutton*, No. 81-328-AM (E.D.Va. Nov. 17, 1982) (unpublished).

In his answer, Williams invoked the defense of sovereign immunity from liability for his alleged negligence. The Supreme Court of Virginia has "listed certain factors to consider in determining whether a state employee is entitled to immunity when he or she is charged with simple negligence in the performance of some duty." *Bowers v. Commonwealth, Dept. of Highways and Transportation*, ___ Va. ___, ___, 302 S.E.2d 511, 514 (1983).

> Under such circumstances, [a court should] examine the function [the] employee was performing and the extent of the state's interest and involvement in that function. Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative .... Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved.

James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).

Daniels alleges that Williams negligently left a pillow on the stairway. Applying the ministerial-discretionary factor, a state court could overrule Williams's plea of immunity because the alleged negligence underlying Daniels's claim was misfeasance of a ministerial duty. *See Phelps v. Anderson*, 700 F.2d 147, 149 (4th Cir.1983); *Semler v. Psychiatric Institute*, 538 F.2d 121, 127 (4th Cir.1976); *First Virginia Bank-Colonial v. Baker*, ___ Va. ___, 301 S.E.2d 8 (1983);

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[4] Daniels's alleged injury occurred on January 23, 1982. The Virginia Tort Claims Act, Va. Code § 8.01-195.1 *et seq.* (Supp.1982), applies only to actions accruing on or after July 1, 1982. Under the Act, Virginia is made liable for negligent acts or omissions of state employees, but "[n]otwithstanding any provision [of the Act], the individual immunity of judges, the Attorney General, Commonwealth's attorneys, and other public officers, their agents and employees from tort claims for damages is hereby preserved to the extent and degree that such persons are presently immunized." Va.Code § 8.01-195.3 (Supp.1982).

Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973). On the other hand, the state's interest and involvement in prison administration is great, and a state court may thus determine that Williams is entitled to immunity. *See Dalson v. Hutto*, No. LD 1131, Vol. 8, No. 1 VADA Quarterly 15 (Cir.Ct. Richmond, Nov. 29, 1982). In short, we cannot confidently predict whether sovereign immunity would apply in this case. Consequently, we must determine whether the possibility of a sovereign immunity defense deprives Daniels of an adequate postdeprivation remedy.

In responding to the argument that Nebraska's tort claims procedure did not adequately protect the plaintiff's property interest because it did not provide him with all the relief available in actions brought under section 1983, the Court held in *Parratt* that the state remedies were sufficient to satisfy the requirements of due process because the "remedies provided *could have* fully compensated the [plaintiff] for the property loss he suffered." 451 U.S. at 544, 101 S.Ct. at 1917 (emphasis added). Thus, *Parratt* does not require that a plaintiff actually receive a remedy for the deprivation of his interest. Instead, *Parratt* holds that procedural due process is satisfied if, in cases where a deprivation hearing is impractical, the state provides a means by which the plaintiff can be compensated for his loss. In other words, under *Parratt* the requirements of due process are satisfied by the provision of a hearing before a tribunal with the power to grant a remedy. *See Groves v. Cox*, 559 F.Supp. 772 (E.D.Va. 1983).

Daniels contends, however, that he is denied due process under *Parratt* because he could be precluded from bringing any claim in any court if his section 1983 action is dismissed and Williams's plea of immunity is sustained. While we agree that this result could deprive Daniels of a remedy, it does not follow that it would deprive him of his right to present a claim and be heard. To be sure, Daniels will be unable to litigate the merits of his claim if a state court determines that Williams is entitled to sovereign immunity. But while due process may sometimes require a state to consider the merits of a plaintiff's charge before deciding whether to terminate his claim, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), it does not

entitle "every civil litigant to a hearing on the merits in every case." *Id.* at 438, 102 S.Ct. at 1158. Rather, due process requires "an *opportunity* ... granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case ...." *Id., quoting Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (citations omitted). And we conclude that Virginia's common law tort action provides Daniels with a meaningful opportunity for a hearing appropriate to the nature of his claim.[5]

Nor does sovereign immunity itself violate due process. "For when a state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Ferri v. Ackerman*, 444 U.S. 193, 198, 100 S.Ct. 402, 406, 62 L.Ed.2d 355 (1979); *see Martinez v. California*, 444 U.S. 277, 280-283, 100 S.Ct. 553, 556-558, 62 L.Ed.2d 481 (1980).

Daniels further argues that the doctrine of sovereign immunity deprives him of a postdeprivation remedy at a meaningful time and in a meaningful manner. *See* 451 U.S. at 540, 101 S.Ct. at 1915. He asserts that, unlike litigation on the question of good faith in a section 1983 action, which is determined only after a full hearing on the merits, litigation on the issue of sovereign immunity precludes a hearing on the merits unless and until the plea of immunity is overruled. This may be true insofar as a determination of whether sovereign immunity applies is compared with a determination of whether qualified immunity applies in a section 1983 action. *But see Harlow v. Fitzgerald*, 457 U.S. 800, 817-819, 102 S.Ct. 2727, 2738-2739, 73 L.Ed.2d 396 (1982). Nevertheless, this argument overlooks the fact that due process is not violated by other affirmative defenses, such as the statute of limitations, which must be decided prior to litigation on the

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[5] Our conclusion, of course, would be different if Virginia's sovereign immunity doctrine had the effect of depriving a prisoner of the right to bring a claim in state court and be heard on the issue of sovereign immunity. *See Parratt*, 451 U.S. at 551, n.9, 101 S.Ct. at 1921, n.9 (Powell, J., concurring in result).

merits. And contrary to Daniels's assertion, he is no more denied a remedy at a meaningful time and in a meaningful manner by the chance that he may be required to litigate the question of sovereign immunity through the entire Virginia court system than he would be by having to appeal an adverse ruling on a plea of the statute of limitations. We therefore see no significant distinction between sovereign immunity and other defenses which persuades us that Daniels is denied an adequate postdeprivation remedy by the possibility that Williams may be entitled to immunity.

In sum, Virginia's common law tort action provides Daniels with a remedy which can fully compensate him for the alleged liberty deprivation. Thus, despite the possibility of a sovereign immunity defense, we hold that Daniels possesses a remedy which provides him with a "meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." 451 U.S. at 541, 101 S.Ct. at 1916. Consequently, we conclude that Daniels has failed to state an actionable claim under section 1983 because he has not been deprived of liberty without due process of law.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-6538*

ROY E. DANIELS, APPELLANT

v.

ANDREW WILLIAMS, DEPUTY, APPELLEE

APPEAL FROM THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND, RICHARD L. WILLIAMS, DISTRICT JUDGE. (CA 82-0106-R)

On Petition for Rehearing:
Argued: December 6, 1983 **Decided November 16, 1984**
(748 F.2d 224)

Before WINTER, *Chief Judge*, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, *Circuit Judges*, sitting en banc.

Russell Williams, Third Year Law Student (Robert E. Shepherd, Jr., University of Richmond School of Law, Patricia L. Harrington, Third Year Law Student, on brief), Stephen Saltzburg, for Appellants; James W. Hopper, Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia, on brief) for Appellees.

WIDENER, *Chief Judge:*

This case is an appeal from a judgment for the defendant in an action brought under 42 U.S.C. § 1983. We affirm.

Roy Daniels was a prisoner in the Richmond city jail on January 23, 1982, when he slipped and fell on a pillow and newspapers negligently left on some stairsteps by the de-

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* This case was argued together with *Ausley* v. *Mitchell*, No. 82-6128, and *Poole* v. *Morris*, No. 82-6143.

fendant Williams, a deputy sheriff. The fall resulted in injuries to Daniels' back and ankle, for which he received medical treatment. While the facts surrounding Daniels' fall may be disputed, the district court found a common law negligence remedy available to Daniels and dismissed the case for failure to state a cause of action. Thus, for the purposes of this opinion, we assume that Daniels fell and that his fall was caused by Williams' negligence.

Daniels' suit must fail for two alternate reasons, either of which is fatal to his claim. The first is that we are of opinion Daniels' bodily injury occasioned by simple negligence was not a liberty interest protected by the due process clause.[1] Second, even if Daniels had a liberty interest violated by the negligence of Williams, then he had a remedy under the law of Virginia which satisfied the requirements of procedural due process.

I.

Parratt v. *Taylor*, 451 U.S. 527 (1981), decided that the negligent loss of two packages of hobby materials, belonging to one prisoner, and lost by a prison employee and another prisoner, was a deprivation of property under the Fourteenth Amendment. *Parratt* p. 536-537. The Court went on to decide, however, that because Nebraska provided a tort remedy as a means of redress for property deprivation, the deprivation was not without due process of law.

Until *Parratt* was decided, in this circuit a claim of mere negligence did not give rise to a cause of action under § 1983. We decided that explicitly in *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970), in which, however, we granted relief in a case where the defendant's actions were variously described to be gross and culpable, wanton and a raw abuse of power, but falling short of an intentional act. So our decision in *Jenkins* so far as property is concerned now gives way to *Parratt*.[2]

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[1] There is no claim of any substantive due process violation. The facts here are not nearly aggravated enough to even make the proposition arguable. See, generally, *Hall* v. *Tawney*, 621 F.2d 607 (4th Cir. 1980).

[2] While the dissenting opinion's analysis of the majority's position, that of extraordinary reluctance to change circuit precedent, may have been helpful in staking out its position, it sets up a strawman to disagree with.

We do not believe the Court intended *Parratt* to be applied automatically in a per se manner in every intance in which an act of negligence can also be stated as a § 1983 claim. The Court itself noted, at p. 534, quoting Baker *v. McCollan*, that "[T]he question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action."

In *Parratt*, the concluding paragraph of the opinion of the Court took pains to explicitly disavow construing its decision so that it might result in "turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." 451 U.S. at 544. The Court continued:

> "It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever circumstance may already be administered by the States.' *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." 451 U.S. at 544.

Thus, the Court, by explicitly rejecting a construction of its opinion which would permit maintaining a § 1983 claim

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Of course the reasoning of *Jenkins* is not consistent with *Parratt*, as *Parratt* makes mere negligence actionable, while *Jenkins* requires more, and, of course, circuit precedent must give way to the superior authority of the Supreme Court. Even the suggestion that these propositions are not acknowledged by the majority is too far fetched to merit more than summary denial. But recognition of the fact that the *result* which *Jenkins* would obtain when applied to a negligent injury to the person happens to agree with the *result* required by *Parratt* in the same situation, indicates not a reluctance on the part of the majority to change circuit precedent, rather the failure of the dissent to acknowledge that *Parratt* and *Jenkins* require similar results on the same fact situation but for different reasons as the majority opinion indicates. We follow *Parratt*.

for bodily injuries based on the negligent operation of an automobile by a state official acting under color of law, has limited its decision. Because we doubt that the Court intended to convey the impression that a prisoner suffering bodily injury from the negligence of a state official stands on a better footing than an ordinary citizen so injured, we think the Court intended to limit its decision to claims for the deprivation of property asserted by a prisoner, and we so hold. The difference in treatment between a prisoner's property and his person may easily be justified. The demands of prison safety, life, and discipline make it obligatory for prison officials to have possession of, and search at some time or another, all of the property belonging to every prisoner. Prisons could be operated in no other fashion. Because the state of necessity has such complete control of the prisoner's property, calling it to account for the unexplained loss thereof is not inconsistent with demands of the Fourteenth Amendment. No such reasons exist, however, to set the prisoner above the ordinary citizen in the protection of his person. If the ordinary citizen may not sue under § 1983 a state employee who has negligently deprived him of a liberty interest by injury to his person, then the prisoner should not be allowed to prosecute a similar claim. The Supreme Court has expressed the same thought in a different context. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,"[3] neither should negligent injury to the person.

We are thus of opinion the negligent injury to the plaintiff's person is not a protectable liberty interest under the due process clause and the complaint does not state a cause of action under § 1983 on that account.

II.

It is not disputed that in Virginia at all times here pertinent a common law tort action for negligence might have been maintained against a state employee performing minis-

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[3] *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976).

terial duties. While the State is immune,[4] see *James* v. *Jane*, 221 Va. 43, 267 S.E.2d 108, 113 (1980), the employee is not. *First Virginia Bank-Colonial* v. *Baker*, 225 Va. ___, 301 S.E.2d 8 (1983). The sovereign immunity which may attach to employees performing discretionary duties does not attach to those performing ministerial acts.

This was made clear in our recent case of *Phelps* v. *Anderson*, 700 F.2d 147 (4th Cir. 1983), and most recently, as we have noted above, by *First Virginia Bank-Colonial* in the state courts. In *Phelps*, prison employees had negligently deprived a prisoner of the use of his television set for a period of time. A prison adjustment committee had decided that the plaintiff owned the set and the prison employees' negligent failure to return the set to the rightful owner, we held, was an act in which they had no discretion, and accordingly, because that prisoner had the right to proceed under Virginia law, we held that *Parratt* barred his § 1983 claim. In *First Virginia Bank* the suit was against the clerk of a court whose deputy had negligently indexed a deed of trust on the wrong page of the index book. The Virginia court held that act to be ministerial and allowed a suit to proceed against the clerk on account of the negligence of the deputy.

In the case at hand, there is no claim that the deputy sheriff, Williams, was exercising any discretionary duty when he left the pillow on the stairsteps, so his actions at the most, looking at the case in the best light from Daniels' side, were merely ministerial. Because Williams' duties were ministerial, it was possible for Daniels to maintain an action in the Virginia courts on account of his injury without being met with the defense of sovereign immunity. Thus, even if Daniels were deprived of a liberty interest protected by the Fourteenth Amendment, the deprivation was not without due process of law under *Parratt* because a post-deprivation remedy was available in the state courts.

The plaintiff argues that sovereign immunity is available to Daniels as a defense, and it follows, the argument goes,

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[4] Virginia recently enacted a Tort Claims Act, Va. Code § 8.01-195.1 *et seq* (Supp. 1982), which applies to acts occurring on or after July 1, 1982, and which surrenders the immunity of the Commonwealth for certain torts under specified conditions. That statute, of course, would have no effect in this case.

that if sovereign immunity is available as a defense, any remedy he may have under state law may be inadequate and not in fact a remedy. The defendant argues that any immunity which may exist under state law is little different from the immunity afforded state officials in the federal courts in suits under § 1983, and continues that since the immunities involved are akin, even if not the same, then the existence of immunity should not serve to permit the suit to be maintained. Because we believe there is no significant difference in the duties of the deputy sheriff in this case, the prison officials in *Phelps*, and the deputy clerk of the court in *Baker*, we think the duties of Williams were ministerial and do not reach the question of whether or not the existence of a possible immunity defense should permit the action to be maintained under § 1983.[5]

The judgment of the district court is AFFIRMED.

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[5] We have grave doubt that the immunity question, whether the acts complained of were discretionary or ministerial, has any proper place in this case in any event, since the case involves a sheriff and not some other public employee or officer. In *Dabney* v. *Taliaferro*, 25 Va. (4 Rand.) 256 (1826), the court held that a sheriff was held to a standard of ordinary care ("omission and neglect" was the exact phraseology) in the keeping of a prisoner by a contract jailer. If a suit may be maintained against a sheriff directly, it could probably be maintained against a deputy, and, even if not, the remedy afforded against the sheriff would satisfy the requirements of *Parratt*.

Our position with respect to this matter is supported by the statement in *First Virginia Bank* that "...we find no logic in a rule that exempts him [a clerk of the court] from the doctrine of *respondeat superior* whether the wrong committed by his deputy is discretionary or ministerial in character." 301 S.E.2d at p. 12. *First Virginia Bank* also noted with approval *Moore's Adm.* v. *Downey, et al*, 13 Va. (3 H.&M.) 127 (1808), and the statement in that case that "[t]he law looks upon the sheriff and his officers as one person; he is to look to his officers that they do their duty; for if *they* transgress, *he* is answerable to the party injured by such transgression; and his officers are answerable *over* to him." 13 Va. (3 H.&M.) at p. 132; 301 S.E.2d at p. 11, n.3.

Because the parties have not approached the case from this angle, we express no opinion on the subject, but, to repeat, whether or not there is necessarily any immunity question in the case seems doubtful.

PHILLIPS, *Circuit Judge*, dissenting in part and concurring in part:

The majority affirms dismissal of Daniels's claim under 42 U.S.C. § 1983 on alternative grounds. First, that as a matter of general principle there is no constitutionally protected liberty interest in being free of bodily injury caused by merely negligent, as opposed to intentional, conduct of state agents, or, put differently, that the merely negligent infliction of bodily injury by a state agent does not constitute "deprivation" of any constitutionally protected liberty interest; second, that even if such an interest in general exists, or such a deprivation might in general occur, any deprivation occurring here was not without due process because the state provides an adequate post-deprivation remedy for Daniels in the form of a traditional common law personal injury negligence action. Since § 1983 requires proof both that there has been deprivation of a constitutionally protected liberty (or property) interest and that it shall have occurred without due process, no cognizable § 1983 claim is here stated.

I disagree with the first ground.

On the second, I agree that with respect to the kind of negligent deprivation of liberty interest here involved a state's post-deprivation tort remedy may provide the process constitutionally due; but I do not believe that due process is provided if a sovereign immunity defense is available to bar the state's post-deprivation remedy. And because I do not believe that on the record before us we can determine whether that defense is so available, I would only affirm dismissal of this § 1983 claim on condition that it might be reinstated if the defense is drawn upon to bar his state claim in state court

I therefore dissent to the outright dismissal mandated by the majority.

I

As I understand the majority's reasoning on the first ground—that there is no constitutionally protected liberty interest in being free of bodily injury inflicted negligently by state agents—it runs as follows. Until *Paratt* v. *Taylor*, 451

U.S. 527 (1981), decided that one could be "deprived" of a constitutionally protected property interest by negligent conduct of state agents, the law of this circuit had been that only intentional conduct could "deprive" of either property or liberty interests. *Parratt* decided only that one might be so deprived of property interests; hence prior circuit law respecting the deprivation of liberty interests is unaffected by intervening Supreme Court authority and remains that one may not be so deprived of liberty interests. By implication, circuit law on liberty interests should not in this case by brought into conformity with *Parratt's* new dispensation as to property interests, because there are rational bases for maintaining the distinction first necessitated by *Parratt*.

With respect, I simply disagree with this analysis.

First off, I do not believe that the critical principles that emerged from *Parratt* can be read as being narrowly confined to property interests. It is true that the case was about a property interest so that the specific holding is so limited, but the threshold issue identified and addressed in the majority opinion was "whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532. And this issue was answered affirmatively, if somewhat obliquely, in the same broad terms in which it was put by the Court: "§ 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind." 451 U.S. at 535.

All of the other Justices writing in the case assumed that a necessary implication of the majority's holding on this point was that it applied to liberty as well as property interests. Justice Powell, concurring, was principally concerned that "deprivation" should not be construed to cover any but intentional acts, and he unmistakably assumed, as his references show, that the Court's opinion applied to deprivations of liberty as well as property interests. 451 U.S. 546-554 & nn.6, 7, 9. Justice Stewart, concurring, also plainly assumed that the majority's specific holding that deprivations of property might be by negligent conduct necessarily would apply in logic as well to deprivations of liberty. 451 U.S. at 544-45 (Stewart, J., concurring). Justice Blackmun, concurring,

joined by Justice White, was only concerned that the majority's post-deprivation remedy analysis should be confined to property cases and not extended to claimed deprivations of life or liberty, clearly assuming that deprivation of either might be by negligent or intentional conduct. 451 U.S. at 545-46.

I therefore believe that whatever may have been the pre-*Parratt* state of circuit law, *Parratt* made it plain as national law that whether challenged conduct was negligent or intentional is irrelevant to the threshold § 1983 question whether it was committed under color of state law and whether it deprived a person of federally secured rights, *see Parratt*, 451.U.S. at 535, and that this is true whether the rights allegedly violated involved property or liberty interests.[1]

Furthermore, I doubt that it is accurate to suggest that before *Parratt*, this circuit had never recognized any § 1983 claim based on mere negligence. Certainly we had recognized such claims in the congruent eighth amendment context. *See, e.g., Withers* v. *Levine*, 615 F.2d 158, 162 (4th Cir.), *cert. denied*, 449 U.S. 827 (1980) (negligent failure to protect prison inmate against known threats of physical harm).[2]

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[1] The majority here relies heavily on the *Parratt* majority's specific expression of concern about § 1983 being extended to cover "an automobile accident with a state official," *see* 451 U.S. at 544, as showing an intention by that *Parratt* Court to confine its "deprivation by negligence" holding to cases involving property interests. But the language quoted occurs in a passage laying out a general justification for finding in state post-deprivation remedies an appropriate means by which to prevent § 1983's extension to *all* negligence cases. Indeed, the *Parratt* Court's hypothetical automobile accident could presumably have given rise both to property damage and personal injury claims; the Court is saying that *both* are being kept out of § 1983's reach by the post-deprivation remedy solution.

[2] The majority says that in *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970), we had decided explicitly that a claim of "mere negligence" did not give rise to a cause of action under § 1983. With all deference, I suggest that the language referred to in *Jenkins* was *dicta* that has necessarily been treated as such in later pre-*Parratt* cases such as *Withers*. *See also McCray* v. *Maryland*, 456 F.2d 1, 5 (4th Cir. 1972) (Sobeloff, J.) (holding that "a section 1983 action may be based on negligence when it leads to a deprivation of rights," citing *Jenkins*).

Finally, with all deference, I simply cannot accept the majority's apparent holding that somehow the fourteenth amendment imposes a more stringent duty upon the states to avoid deprivations of the property than the liberty interests of either their prison inmates or citizens in their free societies. If there is a constitutional scale of values associated with the two kinds of interests, the majority's analysis seems to me to stand on its head the obvious rank order that would be assigned them. *See Parratt*, 451 U.S. at 542 (suggesting that an intentional deprivation of liberty interests is "arguably ... more egregious" than a negligent deprivation of property interests); *id.* at 545 (Blackmun, J., concurring) (suggesting that deprivations of liberty interest might not be adequately remedied by state post-deprivation process through deprivations of property interests could be). Certainly in purely human terms it would be difficult to suppose that the Constitution assigned less value to the concededly modest bodily harm allegedly suffered in this case than the Supreme Court in *Parratt* held that it assigned to the loss of a $23.50 hobby kit.

I would therefore hold, contrary to the majority, that Daniel's complaint states a cognizable § 1983 claim that he was deprived of a liberty interest by the defendant acting under color of state law. This would then lead to the question whether the complaint had also sufficiently alleged that the deprivation was without due process.

The specific holding in *Jenkins* was that the non-intentional infliction of harm there in issue was cognizable in § 1983 because of its particular quality of wantonness and degree. This was thought to amount to a "substantive due process" violation, and the language referred to by the majority was simply setting in contrast negligent inflictions of harm not rising to that level. In retrospect, *Jenkins* and other pre-*Parratt* substantive due process decisions are properly seen as harbingers of the principle that for some deprivations of secured interests—including those caused by "mere negligence"—post-deprivation state remedies *may* supply the process constitutionally due that makes them not cognizable under § 1983. Thus the holdings of those cases are not that "mere negligence" can never deprive of constitutionally secured interests and thus support cognizable § 1983 claims, but that some such deprivations are of such a character that no state post-deprivation remedy could constitute due process. *See Palmer v. Hudson*, ___ U.S. ___, ___, 52 U.S.L.W. 5052, 5058 n.4 (U.S. July 3, 1984) (Nos. 82-1630 and 82-6695) (Stevens, J., concurring).

II

On the due process question, I think it plain that *Parratt's* principal holding that a state's post-deprivation remedies may supply the due process that suffices to defeat an otherwise cognizable claim of rights deprivation under § 1983 applies to liberty as well as property interests. Indeed, the general principle had already been established in the pre-*Parratt* liberty interest case of *Ingraham* v. *Wright*, 430 U.S. 651 (1977) (school paddling), a point the *Parratt* Court expressly recognized and relied upon. *See Parratt*, 451 U.S. at 542 (court's post-deprivation remedy analysis asserted to be "quite consistent with the approach taken ... in *Ingraham*"). Accordingly, I accept that Virginia's ordinary tort remedies (irrespective of any special state Tort Claims Act remedies later provided) might supply the due process that would defeat a § 1983 claim such as Daniels's.

But I would hold that if under state law the defendant in this case could avoid liability on Daniels's state-law claim by the defense of sovereign immunity, the state's post-deprivation remedy does not provide for Daniels the adequate state remedy required to defeat his § 1983 claim on *Parratt/Ingraham* grounds. *See Parratt*, 451 U.S. at 551 n.9 (Powell, J., concurring).[3]

III

But this in turn, then leads to the difficult question of how, in this or any case, a federal § 1983 court is to determine whether an otherwise adequate post-deprivation state remedy is made inadequate because of the possible availability of a sovereign immunity, or other official immunity, defense to the generally cognizable state-law claim. Of course,

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[3] The state suggests that even if sovereign immunity is available to defeat a parallel state tort claim, this cannot be held to negate the adequacy of the state's post-deprivation remedy as due process, given the fact that the availability of a qualified immunity defense to § 1983 claims is not thought to raise any due process questions. There is an element of plausibility in this, but I think it could present a serious question only if the available state immunity defense were no broader than the qualified immunity defense under § 1983. There is no suggestion here of that, and the question can therefore be reserved for another day.

no problem would exist where state law on the point is clear, or is stipulated, or possibly where the defense though available is waived for a particular case. But that, regrettably, is not the case we have. Here, the availability and scope of the defense is by no means clear on the record before us.[4] And indeed, the problem is aggravated here by the fact that though the Commonwealth argues before us that the state remedy is not made inadequate by that means, we are told that in the parallel state action it has raised sovereign immunity as a defense.

In this situation, I believe that the only fair course for a federal § 1983 court—certainly the only fair one for the claimant—is to condition dismissal of the § 1983 action on the abandonment or waiver by the state of any sovereign immunity defense it might assert, or the entry of an authoritative judgment by the state court that the defense does not bar the claimant's state claim.

Accordingly, I would remand to the district court with instructions to dismiss on those conditions, leaving to claimant the right to reinstate his § 1983 claim upon the entry of any judgment in his state action holding his state claim barred by sovereign immunity.

Judge Winter and Judge Murnaghan authorize me to say that they join in this opinion. Judge Ervin authorizes me to say that he concurs in part I of this opinion.

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[4] The majority avoids specific decision on this issue by assuming that if the existence of a sovereign immunity defense could make a state's post-deprivation process inadequate for § 1983 purposes, no such defense would be available under state law to the defendant here, either because the duties in question were ministerial or because no sovereign immunity defense is available to a sheriff (or his deputy) as distinguished from other state officials. For reasons explained in Judge Winter's opinion in the companion cases, No. 82-6128, *Ausley* v. *Mitchell* and No. 82-6143, *Poole* v. *Morris*, and because of the state's litigation positions in this and the parallel state action, I do not believe that the assumption that no sovereign immunity defense will be available in the state action can—in fairness to claimant—be indulged by this court as the basis for dismissal.

ERVIN, *Circuit Judge*, concurring in part and dissenting in part:

I concur in Part II of the majority opinion and in the decision to affirm the judgment of the district court.

I am unable, however, to accept the rationale contained in Part I of the majority opinion, and I respectfully dissent therefrom, for the reasons cogently stated by Judge Phillips in part I of his dissenting opinion, in which I join.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-6128*

RICHARD A. AUSLEY, APPELLANT

v.

J. P. MITCHELL, WARDEN
VIRGINIA STATE PENITENTIARY,
RAY CHAVIS, RECREATIONAL DEPARTMENT, APPELLEES

No. 82-6143*

WILLIAM POOLE, III, APPELLANT

v.

EDWARD C. MORRIS,
SAMMUEL V. PRUETT,
GEORGE L. FURGESON, APPELLEES

APPEALS FROM THE EASTERN DISTRICT OF VIRGINIA, No. 82-6128 AT NORFOLK, RICHARD B. KELLAM, DISTRICT JUDGE; No. 82-6143 at Richmond, David G. Lowe, Magistrate. (82-36-N; CA 81-0152-R)

On Petition for Rehearing:

Argued: December 6, 1983 **Decided November 16, 1984**
(748 F.2d 224)

Before WINTER, *Chief Judge*, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, *Circuit Judges*, sitting en banc.

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* These cases were argued together with *Daniels* v. *Williams*, No. 82-6538.

Russell Williams, Third Year Law Student (Robert E. Shepherd, Jr., University of Richmond School of Law, Patricia L. Harrington, Third Year Law Student, on brief, Stephen Saltzburg, for Appellants; James W. Hopper, Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia, on brief) for Appellees.

WIDENER, *Circuit Judge:*

These two appeals were consolidated for argument from judgments in favor of defendants in actions under 42 U.S.C. § 1983. We affiarm.

Richard Ausley, while an inmate at the Virginia state penitentiary, was sent some art supplies by his family on November 18, 1980. The supplies were picked up by him from the prison package room. He was informed, however, that the art supplies could not be taken from the recreation building. As the art department claimed it did not have facilities to store the materials, Ausley was forced to leave them in the recreational day room, from which they disappeared. He sues for their value.

William Poole, III, when he arrived at the Mecklenburg Correction Center on August 6, 1979, was told that he could not keep some of his personal property. He requested that such property be sent to his sister, Lucille Whittaker. On August 14, 1979, Poole received a set of 47 books. He was informed that he could not keep the entire set, so, rather than break it up, he elected to send it to a certain Becky Shields. The property officer negligently sent to Miss Shields both the personal property intended for Poole's sister and also the books. Poole has not been able to obtain the return of his personal property and sues for its value.

There is no claim other than ordinary negligence asserted by either Ausley or Poole on account of the loss of their property, and its negligent loss states a § 1983 deprivation of property claim under *Parratt* v. *Taylor*, *infra*, unless with due process of law.[1]

These cases are covered by a straightforward application of *Parratt* v. *Taylor*, 451 U.S. 527 (1981); *Phelps* v.

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[1] Each of the courts below dismissed the complaints for the reason that Virginia law afforded a remedy for the property losses.

Anderson, 700 F.2d 147 (4th cir. 1983); *First Virginia Bank-Colonial* v. *Baker*, 225 Va. ___, 301 S.E. 2d 8 (1983); and that part of *Daniels* v. *Williams*, No. 82-6538 (4th Cir. 1984) (en banc), decided this date, which relates to this case.

The duties of the prison employees in both cases now before us were merely ministerial. The state employee in Ausley's case had no discretion but to use ordinary care to keep the art supplies for Ausley, and, in Poole's case, to send the property involved to Poole's sister. Thus, actions could have been brought in the Virginia courts for the value of the property lost. That being true, although Ausley and Poole were negligently deprived of their property, the deprivations were not without due process of law under *Parratt* v. *Taylor*.

A sufficient alternate reason for our decision is that the inmates had an administrative remedy by way of grievance. *Phelps* v. *Anderson*, *supra*.

The judgments are accordingly *AFFIRMED*.[2]

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[2] The separate opinion argues that the recent cases of *Bowers* v. *Com. Dept. of Highways & Transp.*, 302 S.E.2d 511 (Va. 1983), has introduced an uncertainty in the Virginia decisions respecting the immunity of state employees. It bases its reasoning principally on a quotation from *Bowers* that the distinction between discretionary acts (ordinarily immune) and ministerial acts (not ordinarily immune) is "but 'one of the indicia of entitlement to immunity,'" and describes the *Bowers* decision as a "recent development[. . .]." *Bowers* dealt with the act of a state employee which was admittedly discretionary.

While *Bowers* is a recent case, the rule is anything but in the context here. The quotation from *Bowers* seized upon is based upon *James* v. *Jane*, 282 S.E.2d 864 (Va. 1980).

In the sought-for time sequence, the reliance on *Bowers* is misplaced. *James* was in place and decided well before our opinion in *Phelps* v. *Anderson*, 700 F.2d 147 (4th cir. 1983). *Phelps* held that Virginia afforded an adequate remedy in court for the negligent deprivation of use of a prisoner's television set by prison employees, and it depended explicitly upon the reasoning of *James* as authority for its holdings, especially pages 50-55 of the Virginia Reports, Vol. 221. The employees' action complained of was a "simple ministerial act," 700 F.2d at 149, and the court did not read into *James* the doubt now expressed in the separate opinion. Indeed, we note that the quotation from *Bowers*, upon which the separate opinion relies, depends on page 53 of *James* in the Virginia Reports, squarely in the middle of those pages depended upon by this court in *Phelps*. It is apparent that *Phelps* simply does not construe *James* in the same manner as would the separate opinion, and as we do not construe either *James* or *Bowers*. We reiterate our confidence in the holding of *Phelps*. The very

Footnote 2—Continued:

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recent case of *Messina* v. *Burden*, No. 811485, ___Va.___ (Oct. 12, 1984), is in accord with our conclusion.

To repeat, in *Phelps* we construed Virginia law as imposing liability on a state employee for the negligent performance of a ministerial act. The acts complained of here are certainly ministerial. Even if Virginia law may not be "certain [. . .]," separate op. p. 3, as to the immunity of state employees for the negligent performance of discretionary acts, it is certain that state employees negligently performing ministerial acts are not entitled to immunity. See, e.g., *Lawhorne* v. *Harlan*, 214 Va. 405, 200 S.E.2d 569, 571-572 (19730.

Along the same line, we held in *Phelps* that Virginia's grievance procedure ". . . also provided an adequate post-deprivation remedy for Phelps." 700 F.2d at 149. While the Department of Corrections, Division Guidelines, for the grievance procedure have been changed since the occurrence which caused the *Phelps* case, the new Guidelines are not less favorable to prisoners. They have been approved by the U.S. Attorney General under 42 U.S.C. § 1997e. Since the prison grievance procedure is an adequate remedy, it affords sufficient due process to bear the claims. Thus, even were the separate opinion to be correct in its reasoning with respect to immunity, it also would be necessary to reject the holding of *Phelps* with respect to an adequate grievance procedure in order to arrive at the conclusion that it does, i.e., the dismissal of the claim should be conditional. No reason is apparent to us why there should be a conditional dismissal of the claim in the face of an adequate grievance procedure. *Phelps'* holding is to the contrary. See also *Hudson* v. *Palmer*, 52 L.W. 5052, 5057, n. 15 (U.S. 1984).

In this connection, footnote 2 of the minority opinion apparently takes the position that relief in any event is discretionary under the Virginia grievance procedure, although the grievance may admittedly have merit, and cites as support a statement made by the Assistant Attorney General at oral argument indicating that the scope of relief available is "a matter of discretion and not a matter of right." We think the minority errs in relying on only part of the colloquy concerning the discretion involved in the grievance procedure. When counsel stated that awards were "a matter of discretion," he was responding to various questions from the court regarding the adequacy of any remedy the discretion to award which was placed in the hands of a prison official who might be interested in or even be a defendant in the lawsuit. The discussion between the court and counsel dealt with the objectivity of such a hearing officer and whether or not discretion ought to be entrusted to such an officer to decide whether to give an award and the amount thereof. Taken in the entire context of the discussion, contrary to what the minority suggests, we think the attorney was not responding to whether the grievance procedure permitted arbitrary denials of awards otherwise authorized. In fact, counsel maintained

Footnote 2—Continued:

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that the grievance procedure was itself an adequate postdeprivation remedy despite the possible role of a prison official as hearing officer because of the presumption that an official will perform his duty in a lawful manner and the availability of an appeal from the initial determination through various levels in the penal system.

The discussion follows:

> Counsel: May it please the Court if I could just address the question of the availability of the state grievance procedure to Mr. Daniels. [As noted, Daniels' case was argued with these cases]. The grievance procedure which was recently certified by the United States Attorney General under the CRIP Act provides for possibility of monetary compensation for the loss of property. It has not been applied in a personal injury situation . . . The grievance procedure as currently certified is essentially the same grievance procedure that was in effect prior to certification. And, even prior to certification, some compensation had been awarded to inmates for property losses. I believe they had awarded amounts up to $125.
>
> Court: There has been some suggestion that awards that are made are made in a way in which a court normally makes awards, on some independent objective factfinding determination. Here you have got one of the officials who may be one of the defendants in the lawsuit making the determination of how much money should be paid. That is hardly an adequate remedy in terms of objectivity and fairness.
>
> Counsel: Well, your Honor, I would submit that the grievance procedure has built into it various levels of appeals and it goes from the warden of the institution all the way up to the director . . .
>
> Court: But the basis on which awards are made is discretion, not a matter of right?
>
> Counsel: I think that is a fair statement, your Honor, it is a matter of discretion and not a matter of right, based on all of the facts as they appear with some appeal process built into the system . . .
>
> Court: Well, I just find it hard to say it is adequate when it is a matter of the discretionary determination of the prison official who is either himself or herself a defendant or has close connections with a person who is named as a defendant . . .
>
> Counsel: Well, your Honor, I think we have to assume, and I think it is a correct assumption, that individuals are going to perform in a lawful manner. I think obviously this allegation that arises later that they didn't—a new cause of action has been stated and maybe that remedy is not adequate. But, until those facts are developed, or at least alleged, I think we must assume that prison officials will appropriately carry out their duties.

From this colloquy, it is apparent that counsel did not intend to suggest that the grievance procedure permitted arbitrary denials of otherwise au-

Footnote 2—Continued:

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thorized awards. To begin argument, counsel discussed the current guidelines for the grievance procedure which were recently certified by the United States Attorney General and commented that these guidelines were essentially the same as those in effect prior to certification. The current guidelines which were in effect at the time of oral argument establish available remedies and explicitly provide, *inter alia*:

> 4-14.5 . . . The grievance procedure shall afford a successful grievant a meaningful remedy . . . Remedies must include, but not be limited to, the following: (h) Loss of inmate property within the custody and control of the unit—return of property, replacement of property of equal value at time of loss, or monetary payment equal to value of property at time of loss.

Department of Corrections Commonwealth of Virginia, Inmate Grievance Procedures (Feb. 14, 1983) (superseding prior certified guidelines issued Oct. 12, 1982).

By comparison, the precertification guidelines in broader language provided ". . . inmates with an administrative method for the settlement of grievances they have relating to their confinement." They gave inmates "a regularly available channel for the expression of their grievances," and were to "foster prompt solutions." Authority to decide the same was specifically provided: "The Superintendent will have the necessary authority to resolve inmate complaints filed pursuant to this Guideline." An administrative appeal from the decision of the Superintendent was provided for. Department of Corrections Commonwealth of Virginia Inmate Grievance Procedure (March 31, 1977). Significantly, to repeat, we held in *Phelps* that the grievance procedure under the precertification guidelines provided an adequate postdeprivation remedy for an aggrieved inmate. 709 F.2d at 149.

Implicit in counsel's reference to the current, as well as the precertification guidelines, is the fact that any award to an aggrieved party is based on the discretion of the factfinder in considering the merits of the complaint. We think counsel in no way suggested that discretion could be exercised arbitrarily to deny otherwise valid claims. Clearly, the basis for the awards under both the current and precertification guidelines would be an exercise of discretion on the part of the fact-finder in addressing the merits of a complaint and, in this sense, awards would be a matter of discretion and not a matter of right. To the extent that the minority concludes from the statement of the attorney that awards are purely discretionary, thus implying that no adequate state remedy exists, it has failed to consider that, in addressing the issue of discretion involved in granting awards, the attorney obviously was responding that any award under the grievance procedure would be based on the discretion of the hearing officer in considering the merits of the complaint. This is no different than the way a federal district judge considers a case before him, or any other trial judge for that matter.

WINTER, *Chief Judge*, concurring in part:

In these two appeals, the principal question to my mind is whether Virginia affords a state-court state-law remedy for the property losses sustained by the two plaintiffs if they can prove their allegations of liability. Certainly *Parratt* v. *Taylor*, 451 U.S. 527 (1981), teaches that they have no cause of action under 42 U.S.C. § 1983 if they have a state remedy. To my mind also, the question of whether there is a state remedy depends upon a determination of whether Virginia would recognize the defense of sovereign immunity if the defense is pleaded in a state tort action in a state court.[1] The very recent decision in *Hudson* v. *Palmer*, ___ U.S. ___, ___, 52 U.S.L.W. 5052, 5057 (July 3, 1984) strongly suggests that if sovereign immunity is available as a defense, the requirements of *Parratt* to oust § 1983 jurisdiction would not be met.

The majority opinion concludes that Virginia would not recognize sovereign immunity as a defense were these actions pending in a state, and I am inclined to agree. In *Palmer* itself, the Court accepted the correctness of our statement that Palmer's claim for intentional destruction of his noncontraband property would not be barred by sovereign immunity if he asserted it in an action in a state court. We have also held in *Phelps* v. *Anderson and Langford*, 700 F.2d 147, 149 (4 Cir. 1983), that an inmate's claim for wrongful deprivation of his television receiver, asserted against two prison officials who confiscated it improperly and failed to return it after he proved ownership, would not be barred by sovereign immunity.[2] Both in the majority opinion and in

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[1] The record does not disclose if either plaintiff has instituted any action in a state court. In a companion case, consolidated for argument with these two appeals—No. 82-6538, Daniels v. Williams—plaintiff sued both in state and federal courts for personal injuries. In the state court action, defendant pleaded sovereign immunity while before us he contends that the defense is not available. Counsel for the defendants in his brief in these two cases argues that sovereign immunity will not be held to bar a state-court suit. Nevertheless, in oral argument he admits that he would advance a sovereign immunity defense in state court. Counsel's candor does not dispel the uncommendable inconsistency in his approach.

[2] As an alternative holding, *Phelps* said that the then Virginia grievance procedure provided a postdeprivation remedy to preclude Phelps'

Phelps, we have deemed the touchstone of whether sovereign immunity may be successfully pleaded to be a factual determination of whether the state employee was performing a discretionary or ministerial act when he gave rise to liability. If discretionary, he is immunized from liability by sovereign immunity, if ministerial, sovereign immunity is not available as a defense to personal liability.

The state precedents cited and discussed in the majority opinion and in *Phelps* certainly appear to stand for the proposition for which they are cited. There is, however, a later state decision, not mentioned by the majority, which I think at least raises the specter that we may not have correctly discerned the state of Virginia law. The case is *Bowers* v. *Commonwealth of Virginia, Dept. of Highways & Transp.*, ___ Va.___, 302 S.E.2d 511 (1983). That case held that the resident engineer of the highway department was entitled to assert sovereign immunity for his alleged negligence in the construction of a concrete culvert incident to improvement of a state highway. The unsettling aspect of the case is that it appears to scuttle the bright line test that sovereign immunity applies to discretionary acts but is not applicable to min-

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§ 1983 claim for damages for temporary deprivation of the use of his television set. *Phelps* was decided after the decisions of the district court in the instant cases but well before they were reargued in banc.

Phelps was not cited by the Commonwealth as a supplementary authority; and when the court inquired of counsel for the Commonwealth about the scope of relief available under Virginia's grievance procedure, we were told that awards are "a matter of discretion and not a matter of right." We were also told by counsel for plaintiffs that they had unsuccessfully sought redress for their claims under the Virginia grievance procedure. I would therefore decline to reach the issue of the effect of the Virginia grievance procedure on plaintiffs' right to maintain their actions in the district court.

But even if the Virginia grievance procedure is to be considered, I think that, like the defense of sovereign immunity discussed in the text, the record is not sufficiently complete to hold unconditionally that the grievance procedures provide a postdeprivation remedy in these cases sufficient to foreclose plaintiffs' claims under *Parratt*. In my view, it is incumbent on the Commonwealth to offer proof demonstrating the availability and the complete efficacy of any postdeprivation remedy relied on to invoke the rule of *Parratt*. Short of such a showing, any dismissal of plaintiffs' complaints should be a conditional one.

isterial acts. Instead it is but "one of the indicia of entitlement to immunity." 302 S.E.2d at 515. In this regard, as the dissenters in *Bowers* point out, that decision gives new life to the conflict between two apparently divergent lines of Virginia authority with regard to the availability of sovereign immunity as a defense in a suit against a state employee for his alleged negligence. 302 S.E.2d at 516.

In short, recent developments have rendered the applicable Virginia law difficult if not impossible to predict with certainty.[3] Unfortunately, Virginia is a state that has no mechanism whereby we can certify the question and obtain an authoritative answer. I am persuaded by some of our past unsuccessful efforts to give authoritative and correct answers as to state law that we ought not overlook the possibility that once again we may not have made a correct prediction. We ought to afford plaintiffs some protection from an erroneous determination on our part.

While I would therefore affirm the judgments of the district court, I would require the district court to grant, as a condition of dismissal, leave to plaintiffs to reinstate their cases in the event that sovereign immunity is upheld as a defense to the prosecution in a Virginia court of any claim now pending or hereafter filed arising out of the facts and matters alleged in their complaints under § 1983.[4]

Judge Phillips and Judge Murnaghan authorize me to say that they concur in this opinion.

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[3] We had occasion to express this conclusion in *Fox* v. *Curtis*, 712 F.2d 84, 89 (4 Cir. 1983). Further evidence of the expansion and confusion of Virginia's sovereign immunity defense is the Supreme Court of Virginia's recent decision in *Hinchey* v. *Ogden*, ___ Va. ___, 307 S.E. 891 (1983). In *Hinchey*, the court extended the doctrine to cover, not only actions at law for damages but also, suits in equity to compel or restrain action by government. *Id.* at 894.

[4] This is essentially the course of action recommended in a thoughtful article, *see* K. Blum, The Implications of *Parratt* v. *Taylor* for Section 1983 Litigation, 16 The Urban Lawyer 363, 380-81 (1984).

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No. 84-5872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROY E. DANIELS,

Petitioner,

v.

ANDREW WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that a state may constitutionally deny a prison inmate any remedy for physical injuries suffered as a result of the negligence of a state prison employee, regardless of the seriousness of the injuries suffered, and in holding that a prisoner has a constitutionally protected interest only in his tangible property, not in his body?

2. Did the court of appeals err in holding that, even were it to find that a prisoner has a constitutionally protected interest in his body, this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), extends to liberty as well as property interests and bars a suit under 42 U.S.C. § 1983 for damages by a prisoner alleging injuries as a result of the negligence of a state prison employee as long as a state remedy exists?

3. Did the court of appeals err in holding that a meaningful state remedy, as required by this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), was available to a state prisoner who alleged personal injuries resulting from the negligence of a state prison employee where the employee relied on a defense of sovereign immunity, the employee declined to abandon that defense before the *en banc* court of appeals, and the court of appeals could not guarantee that sovereign immunity would not, in fact, bar the prisoner's recovery in state court?

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PROCEEDINGS BELOW

The United States District Court for the Eastern District of Virginia held that petitioner was barred from proceeding in this civil rights suit as a result of this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981). Its memorandum opinion is unreported, but is set forth in the Joint Appendix (J.A.) at pages 19-20. A panel of the United States Court of Appeals for the Fourth Circuit affirmed. The opinion is found at 720 F.2d 792 (4th Cir. 1983) and in the Joint Appendix at pages 22-31. By a divided vote, an *en banc* court of appeals also affirmed the district court. The *en banc* opinions are reported at 748 F.2d 229 (4th Cir. 1984) and are included in the Joint Appendix at pages 32-44. This Court granted a writ of certiorari on February 19, 1985.

JURISDICTION

Petitioner brought this action under 42 U.S.C. § 1983, with jurisdiction grounded in 28 U.S.C. §§ 1331 & 1343(3). He appealed the district court's dismissal of his action pursuant to 28 U.S.C. § 1292. He petitioned for certiorari to this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The facts of this case are simple. Roy Daniels, petitioner, was a prisoner in the Richmond city jail on January 23, 1982. (J.A. 6). He claims that on that day he slipped and fell on a pillow and newspapers negligently left by the respondent on stairs which Daniels used. (J.A. 6). Petitioner brought an action against respondent under federal law to avoid respondent's sovereign immunity defense in state court.

Petitioner alleged in his suit that he injured his back and his ankle when he fell and that the injuries were caused by respondent's negligence. The lower courts found that petitioner could not proceed with his federal action, even assuming that he could prove what he alleged.

The United States District Court for the Eastern District of Virginia held that this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), barred a federal action, since petitioner could proceed with his negligence claim in state court. (J.A. 20). A panel of the United States Court of Appeals for the Fourth Circuit agreed (J.A. 31), but the court of appeals granted a rehearing *en banc*. Following reargument, a majority of the panel reaffirmed the conclusion that petitioner could not proceed with his federal action, but the majority reached its result through a very different analysis from the one used by the district court and the panel. (J.A. 35).

The majority of the court of appeals decided three separate issues against petitioner: First, a 5-4 majority found that the Commonwealth of Virginia would not violate petitioner's Fourteenth Amendment rights if it denied him an opportunity to seek a meaningful remedy against a state officer whose negligence resulted in injuries, even serious ones, to petitioner's body. This majority reasoned that an injury to a prisoner's person, no matter how serious, does not require the meaningful post-deprivation remedy that this Court found necessary following a $23.50 negligence-based property loss in *Parratt* v. *Taylor*. Second, the *en banc* court unanimously agreed that, even if a prisoner is entitled to some remedy for personal injuries attributable to the negligence of state officials, *Parratt* v. *Taylor* would apply to deprivations of liberty in the same way it applied to deprivations of property. Thus, *Parratt* v. *Taylor* would bar Petitioner's claim if he had a meaningful post-deprivation remedy in state court. Third, a 6-3 majority of the *en banc* court held that petitioner had a meaningful remedy in state court, despite the fact that respondent, who was represented in the brief in the court of appeals by the Attorney General of Virginia, asserted that he would rely in both state and federal court upon sovereign immunity. (J.A. 51).

SUMMARY OF THE ARGUMENT

The lower courts are confused as to when 42 U.S.C. § 1983 is available as a remedy for persons who claim that they have suffered physical injuries or property damage as a result of wrongful actions by officials acting under color of state law. The confusion surrounds several questions: May a complaint that alleges a negligent act by a person acting under color of state law state a claim under 42 U.S.C. § 1983? If so, does it matter for purposes of 42

U.S.C. § 1983 whether the negligent act injures liberty or property interests? When is a state remedy sufficiently "meaningful" to satisfy the demands of the Fourteenth Amendment so that an action under 42 U.S.C. § 1983 is barred?

Petitioner believes that the legislative history of 42 U.S.C. § 1983 and this Court's construction of the statute support four arguments. He believes that if these arguments are accepted, much of the current confusion surrounding § 1983 will dissipate as lower courts will have clearer guidance as to the scope of the statute, and the relationship between state and federal courts envisioned when § 1983 was adopted will be restored.

First, petitioner argues that § 1983 envisions that actions like his should be heard in state courts and that as long as state courts are prepared to protect persons who are in the state's custody § 1983 should not be read to create a cause of action for simple torts. In this argument petitioner urges that the Court accept neither a distinction between liberty and property interests nor a distinction between intentional and negligent torts.

Instead, petitioner suggests that a line be drawn between constitutional claims arising at the moment that an official acts and constitutional claims arising only when no remedy is provided by the state following official action. The first category of claims always would be actionable under 42 U.S.C. § 1983, but the second category would give rise to a cause of action only where a state failed to provide the constitutionally required remedy.

Second, petitioner asks this Court to recognize that liberty interests may arise under the Constitution or laws of the United States whereas property interests often are created by state law. Although petitioner urges that both

liberty and property interests generally should be treated alike insofar as 42 U.S.C. § 1983 is concerned, he asks this Court to recognize that federal courts are not limited to an examination of state law when they are asked to decide whether a liberty interest exists in any given case involving actions by state officers.

Third, petitioner urges that a state remedy is not sufficiently meaningful to satisfy the demands of the Fourteenth Amendment where the state has established a bar to suit in state court that effectively negates any state cause of action to remedy a deprivation of liberty or property. Thus, a bar to suit in state court that is too broad leaves the doors of federal courts open to suits brought under 42 U.S.C. § 1983.

Fourth, it is important that there be a clear rule for determining early in a case whether a state remedy is sufficiently meaningful to satisfy the demands of the Fourteenth Amendment so that an action under § 1983 will not be permitted. Without a clear rule, litigants will litigate simultaneously in state and federal court and waste the resources of both courts. The result of uncertainty is not only to delay remedies for deprivations or liberty and property, but also to delay the prompt disposition of litigation and to impair the efficiency of state and federal judicial systems. A workable rule should provide that a federal court will entertain a prisoner's action alleging a negligent or intentional deprivation of liberty or property by an official acting under color of state law where: that official invokes a sovereign immunity defense; he or she is afforded an opportunity to withdraw the defense, but insists upon maintaining it; and the state has not provided an immediate and final means for a plaintiff to establish that the defense is unavailable.

ARGUMENT

I. A STATE MAY NOT CONSTITUTIONALLY DENY A PRISON INMATE A REMEDY FOR PHYSICAL INJURIES SUFFERED AS A RESULT OF THE NEGLIGENCE OF A STATE PRISON EMPLOYEE, REGARDLESS OF THE SERIOUSNESS OF THE INJURIES SUFFERED, SINCE A PRISONER HAS A CONSTITUTIONALLY PROTECTED INTEREST IN HIS BODY AS WELL AS IN PROPERTY THAT HE IS PERMITTED BY THE STATE TO POSSESS.

A. Some Claims Arise Under 42 U.S.C. § 1983 The Moment A State Official Acts While Others Arise Only If The State Fails To Provide A Remedy For Injuries Suffered As A Result Of Intentional Or Negligent Acts By State Officers.

The most familiar type of claim brought under 42 U.S.C. § 1983 is illustrated by one of the most important cases this Court has decided in construing the statute, *Monroe* v. *Pape*, 365 U.S. 167 (1961). The plaintiffs claimed that the invasion of their home and the subsequent search without a warrant and the arrest and detention of Mr. Monroe without a warrant and without arraignment constituted a deprivation of their "rights, privileges or immunities secured by the Constitution' . . . ." *Id.* at 170. This Court held that a claim was stated under the statute even though the defendants might have acted in violation of state law.

Monroe illustrates the typical claim that officials acting under color of state law deprived the plaintiffs of rights, privileges or immunities arising under the Constitution or the laws of the United States at the moment the officials acted. The *Monroe* complaint alleged violations of the Fourth and Fourteenth Amendments that occurred at the time the officers entered the house, searched and detained Mr. Monroe. This Court has confronted a host of

similar claims in which plaintiffs alleged that at the time officials acted they violated federal law. See, for example, *Perry* v. *Sinderman*, 408 U.S. 593 (1972), where a college teacher alleged that the decision not to rehire him was based on his exercise of First Amendment rights; *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), where the plaintiff alleged that her employer had discriminated against her on the basis of her race and sex; *Tower* v. *Glover*, ___ U.S. ___, 104 S.Ct. 2820 (1984), where the plaintiff alleged a conspiracy on the part of public defenders who represented him in criminal proceedings and various public officials.

Many of the cases in which this Court has rejected claims raised under § 1983 also involve allegations that officials violated federal law at the moment they acted. See, for example, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), where a college teacher alleged that officials violated the First Amendment and denied him procedural due process in deciding not to renew his contract; *Paul* v. *Davis*, 424 U.S. 693 (1976), where police chiefs distributed "flyers" of "active shoplifters" bearing the plaintiff's picture; *Procunier* v. *Navarette*, 434 U.S. 555 (1978), where a state prisoner alleged that prison officials had negligently interfered with his mail; *Baker* v. *McCollan*, 443 U.S. 137 (1979), where the plaintiff was an innocent man who had been arrested pursuant to a facially valid warrant; *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), where plaintiffs alleged that police officers had perjured themselves in their testimony in state criminal trials.

In all of these cases, the Court assumed that if the defendant officials violated federal law when they acted, the plaintiff was entitled to pursue an action under 42 U.S.C. § 1983, notwithstanding the availability of state remedies. When the Court found that plaintiffs were not

entitled to prevail, it either held, as in *Roth*, *Paul*, and *McCollan*, that no liberty or property interest protected by the Constitution or laws of the United States had been violated or, as in *Navarette* and *Briscoe*, that an immunity from suit barred the action.

The Court took a very different approach in *Parratt* v. *Taylor*, 451 U.S. 527 (1981). The plaintiff, an inmate at a Nebraska prison, had ordered certain hobby material by mail. It was valued at $23.50. Because the plaintiff was in segregation and was not permitted to have the hobby kit with him, prison officials held the kit for him. When the plaintiff was released from segregation, he found that the kit was missing and brought an action in federal court to recover damages for the negligent loss of his property.

Writing for the Court, Justice Rehnquist reasoned that

> [b]oth *Baker* v. *McCollan* and *Monroe* v. *Pape* suggest that § 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution of the United States. (451 U.S. at 527).

The Court had no difficulty in finding that the defendants in *Parratt* acted under color of state law, since they "were, after all, state employees in positions of considerable authority." *Id.* at 535-36. The second question was more difficult, however, since the plaintiff had alleged no violation of a specific right, privilege, or immunity, but had relied generally on the Due Process Clause. 451 U.S. at 536.

The Court examined its prior decisions on the scope of the Due Process Clause and found that decisions requiring pre-deprivation hearings were not feasible in the context of a negligent deprivation of property. *Id.* at 538-41. Ultimately, the Court concluded that Taylor failed to allege a violation of the Due Process Clause, because "[a]lthough he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure" and "the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation." *Id.* at 542. The Court found that the state remedy was adequate even though it might not provide all the relief available under § 1983. *Id.* at 544. The Court expressed some concern at the conclusion of its opinion that too broad a reading of § 1983 might turn every accident involving a state official into a federal cause of action. *Id.*

Three terms later this Court considered *Hudson* v. *Palmer*, ___ U.S. ___, 104 S.Ct. 3194 (1984). Palmer, an inmate at a Virginia prison, sued in federal court to challenge *inter alia* "shakedown" searches and the destruction of his property during the searches. Chief Justice Burger wrote for the Court as it held that the *Parratt* reasoning "applies as well to intentional deprivations of property." 104 S.Ct. at 3203. Thus, "[i]f negligent deprivations of property do not violate the Due Process Clause because predeprivation process is impracticable,[1] it follows that intentional deprivations do not violate that

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[1] Between its decisions in *Parratt* and *Hudson*, the Court decided *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), which establishes that *Parratt* does not bar a suit under § 1983 where an "established state procedure" destroys an entitlement without affording proper procedural safeguards. *Id.* at 436.

Clause *provided, of course, that adequate state post-deprivation remedies are available.*" *Id.* at 3204 (emphasis added). The Court found that both lower courts had held that the prisoner's claim would not be barred by sovereign immunity and that the prisoner "candidly acknowledges" that a Virginia trial court probably would rule that there should be no immunity. *Id.* at 3206.

The Court's approach in both *Parratt* and *Hudson* creates a sensible and workable distinction between categories of constitutional claims. When a prisoner alleges that at the time officials acted they violated a federal right, the Court will ignore the availability of state remedies and ask only whether the facts as alleged, if proved, indeed establish that a federal right was affected by actions taken under color of state law.[2]

Parratt and *Hudson* fall into the second category of cases in which officials do not violate federal rights at the time they act—e.g., when they injure property or the person of a prisoner—but, once having acted, they will violate the Due Process Clause if an injury resulting from their actions goes unremedied. In this category of cases, federal courts are concerned with whether the facts alleged, if true, demonstrate that state officials negligently or intentionally injured the person or property of the plaintiff and, if they did, whether the state provides a remedy that is sufficient to satisfy the demands of Due Process.[3]

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[2] Because the Court ignores state law, it has not required exhaustion of state remedies prior to the bringing of the federal action. *See, e.g., Patsy* v. *Board of Regents*, 457 U.S. 496 (1982) and cases cited therein at 457 U.S. 500.

[3] It is true that neither *Parratt* nor *Hudson* indicates whether all negligent or intentional acts resulting in harm to prisoners or others

B. There Is No Valid Reason To Treat Injuries To The Person Less Favorably Than Injuries To Property.

The court of appeals in the instant case held by a 5-4 vote that the state would not deny petitioner Due Process if it failed to provide a remedy for injuries resulting to petitioner from the negligence of an officer acting under color of state law. Certainly, nothing in *Parratt* or *Hudson* suggested that property interests were to be preferred to liberty interests, and every other court of appeals that has considered the point has reached a conclusion opposed to the one reached by the majority of the court of appeals below.[4]

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requires a post-deprivation remedy or whether the decisions are to be limited. In the final section of this first argument, petitioner suggests the reason why prisoners have a particular need for remedies and that it would be appropriate for the Court to limit the requirement of post-deprivation remedies to special circumstances.

[4] *See, e.g., Davidson* v. *O'Lone*, 752 F.2d 817, 822 (3d Cir. 1984) (en banc) (prisoner's freedom for harm to person is a protected interest, *Wilson* v. *Beebe*, 743 F.2d 342 (6th Cir. 1984) (bodily injuries received due to state trooper's negligence are liberty deprivations); *Thibodeaux* v. *Bordelon*, 740 F.2d 329 (5th Cir. 1984) (injuries suffered by pretrial detainee due to city officials' negligence are liberty deprivations); *Brandon* v. *Allen*, 719 F.2d 151 (6th Cir. 1983) (damages for injuries received due to police director's negligence in preventing an assault are not recoverable due to qualified immunity), *rev'd sub nom., Brandon* v. *Holt*, 105 S.Ct. 873 (1985); *Haygood* v. *Younger*, 718 F.2d 1472 (9th Cir. 1983), *rehearing en banc granted*, 729 F.2d 613 (1984) (extended prison term due to official's negligence in calculating sentence is a liberty deprivation). *See also Holmes* v. *Ward*, 566 F.Supp. 863 (E.D.N.Y. 1983) (injuries received after prison officers negligently failed to separate inmates represents a liberty deprivation). *See also Junker* v. *Tinney*, 549 F.Supp. 574 (D. Md. 1982) (burns received by inmate due to prison officials' negligence are liberty deprivations).

Judge Phillips, joined by three other judges, dissented and made the following points:[5]

> I do not believe that the critical principles that emerged from *Parratt* can be read as being narrowly confined to property interests. It is true that the case was about a property interest so that the specific holding is so limited, but the threshold issue identified and addressed in the majority opinion was "whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532. And this issue was answered affirmatively . . . .
>
> All of the other Justices writing in the case assumed that a necessary implication of the majority's holding on this point was that it applied to liberty as well as property interests . . . .
>
> . . . I simply cannot accept the [court of appeals'] majority's apparent holding that somehow the fourteenth amendment imposes a more stringent duty

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[5] The only lower court case which has found that a deprivation alleged to have resulted from the negligence of state officials did not amount to a liberty interest within the potential scope of § 1983 (depending on whether a meaningful post-deprivation remedy exists in state court) is *Jackson* v. *City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1325 (1984). This case is plainly distinguishable from the *en banc* court's holding below and supports the dissenters in the court of appeals. In *Jackson*, the court held that a death that occurred after state officials negligently assisted a rescue is not a constitutional deprivation. 715 F.2d at 1206. The court stressed that the victim's own actions, wrecking her car, caused the harm, not the officials' failure to rescue. *Id.* at 1204. It reasoned that only "negative" liberty deprivations—the right to be left alone—as opposed to "positive" liberty deprivations—the right to receive protective services—are protected by the due process clause. *Id.* at 1203-04. Justices White and Rehnquist dissented from the denial of the petition for certiorari. 104 S.Ct. 1325.

Jackson supports the dissent below in the instant case, since it plainly indicates that negligent infliction of injuries by state officials invades liberty interests.

> upon the states to avoid deprivations of the property than the liberty interests of either their prison inmates or citizens in their free societies. If there is a constitutional scale of values associated with the two kinds of interests, the majority's analysis seems to me to stand on its head the obvious rank order that would be assigned to them. (748 F.2d at 234, 235).

Petitioner urges Judge Phillips' reading of *Parratt* and his reasoning upon this Court. The majority of the court of appeals interpreted this Court's concern about the possibility that every automobile accident involving a state official might become a potential federal action under § 1983 as establishing that this Court meant to include only property and not liberty interests within the protection of the Fourteenth Amendment. 748 F.2d at 231. Petitioner argues that the court of appeals' majority misinterpreted this Court.

The reasoning of the court of appeals' majority is faulty in virtually every respect. The most obvious defect is apparent in the discussion of the automobile accident problem. Under the majority's approach, a person who is injured by a state official might be able to sue for damage to his car, but not to his person. Thus, the fender of a car receives more protection than the body of an individual. Damage to the windshield falls within the purview of the Fourteenth Amendment but serious injury, even death, to a human being does not.

This is not only a strange view of the law, but it also is one that finds no support in anything that this Court actually did or said in *Parratt* or *Hudson*. Moreover, the court of appeals totally ignored the legislative background of § 1983. Its reasoning flies in the face of the legislative history of the statute.

This Court has observed on several occasions—e.g., *Monroe* v. *Pape*, 365 U.S. at 170-82; *Mitchum* v. *Foster*,

407 U.S. 225, 238-42 (1972)—that the statute was enacted during the reconstruction period as part of a federal effort to guarantee basic federal rights against state power. The opinions of this Court have repeatedly noted that § 1983 was enacted to enforce the Fourteenth Amendment against state action, whether that action was legislative, executive or judicial. See, e.g., *Mitchum* v. *Foster*, 407 U.S., at 240, *citing Ex Parte Virginia*, 100 U.S. 339, 346. That history emphasized the importance of protecting people. Part of the protection surely went to protecting people's enjoyment of their property, but the core of the protection was directed at individuals who were subject to harassment by the Ku Klux Klan and to denial of the protection of the law. See *Monroe* v. *Pape*, 365 U.S. at 174.

If the court of appeals' majority is correct, then its reasoning ineluctably applies to intentional torts committed by state officials against prisoners, since the majority held that this Court intended to say only that 42 U.S.C. § 1983 protects the property of prisoners, not their persons. This reading of the statute requires a conclusion that the drafters, who feared that officials operating under color of state law would undermine the rights of individuals and that a federal remedy was necessary to protect every person's constitutional rights, were indifferent to persons who were in the custody of state officials. To accept this reasoning, the Court would have to ignore the legislative history that it has analyzed so frequently since *Monroe* v. *Pape* and for the first time find that the drafters of the statute were really not concerned for the safety and well-being of people; the Court would have to conclude that they only wanted to protect property. No such reading of the history of § 1983 is reasonable. It amounts to a virtually complete

misrepresentation of the concerns that led to the passage of the statute.

The reading given the statute by the court of appeals is belied by its plain language. Section 1983 protects "rights, privileges and immunities." It is broadly written. Were it confined to property interests, or were property interests the principal focus of the statute, the word "property" might reasonably be expected to appear in the statute. It is noticeably absent.

It appears, therefore, that the court of appeals' majority misread this Court's opinions in *Parratt* and *Hudson;* that it interpreted the statute without any regard for its history and purpose; that it paid no attention to the plain language of the statute; and that it expressed an unnecessary preference for property over human beings that conflicts with basic notions of fairness and common sense. For these reasons, petitioner urges this Court to reject the holding of the court of appeals and to treat the person and property of a prisoner similarly for purposes of 42 U.S.C. § 1983.

There is another reason why petitioner asks this Court to reject the approach taken by the court of appeals' majority: that approach is bound to make litigation turn on small nuances in pleadings, cause repetitious litigation, and create enormous problems for federal and state courts that seek to accomodate one another in the interests of justice and efficiency. The practical problems with the holding of the majority below can be illustrated by changing the facts of the instant case only slightly.

To make his point, petitioner asks this Court to assume that he had been carrying a hobby kit when he fell on the stairs of his prison. Under the majority's reasoning, peti-

tioner then could sue in federal court to recover for any damage to his property[6] but not to his person.

The majority's approach will force courts to decide whether a given claim is actually a liberty or a property claim. Petitioner's case is a good illustration. The majority assumed that it was a pure liberty claim, but this is not necessarily so. To the extent that damages for personal injuries are intended to offset future medical expenses, they appear to be in the nature of property as well as liberty. Would the court of appeals' majority limit a federal lawsuit to pain and suffering damages and deny recovery for future medical expenses? The answer is unclear.

Also unclear is how the court of appeals would treat such cases as *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, and *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). This Court spoke in *Zimmerman* about an entitlement interest which it described as a property interest. 418 U.S. at 436. In *Wolff*, this Court spoke of a state-created right to good time credit as a liberty interest. It appears it will not always be clear whether a state-created expectancy is best described as a liberty or property interest. Unless the approach of the majority below is adopted, there is no reason to require federal courts to attempt to split hairs in order to attach one label or another to an expectancy interest. The majority's approach not only would burden federal courts unnecessarily, but it also would invite litigants to attempt by careful pleadings to describe an entitlement as a property interest in order to proceed under § 1983.

These additional reasons argue against the approach taken by the majority in the court of appeals.

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[6] This assumes, to use the words of *Hudson*, "that adequate state post-deprivation remedies are [not] available."

C. No Distinction Should Be Drawn Between Intentional And Negligent Acts.

Although the court of appeals did not draw a line between negligent and intentional actions by state officials, petitioner believes that this Court might well address such a line since two Justices appeared to oppose recognition under § 1983 of claims resting on allegations of negligent acts in *Parratt*—e.g., 408 U.S. at 544-45 (Stewart, J. concurring); 408 U.S. at 546-54 (Powell, J., concurring in the result)—and one lower court[7] has indicated that it does not believe that this Court meant to say what it did in *Parratt*.

There are four reasons why petitioner urges that this Court reject any proposed distinction between negligent and intentional acts. First and most important is the reason given by Justice Rehnquist in his majority opinion in *Parratt*: Nothing in the language or legislative history of § 1983 suggests that it was intended to apply solely to intentional deprivations. 451 U.S. at 534.

Second, were the Court to recognize the distinction, litigants almost certainly would respond by alleging in as many cases as possible that harm resulted from intentional actions by state officials. Under the facts of *Parratt*, for example, the plaintiff, by alleging that his hobby kit had been received and held by state officers who could not explain its disappearance, might have been able to allege sufficient facts to support a claim that the kit was intentionally taken. Certainly, he could have

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[7] *Davidson* v. *O'Lone*, 752 F.2d 817 (3d Cir. 1984) (en banc).

pleaded in the alternative that the kit was either intentionally taken or negligently lost.

The instant case affords another example. Petitioner could have alleged that a pillow was left on the stairs with the intention of harming him. Since intent is a subjective concept, in many cases a trial would be necessary to resolve the question whether there was an intent to commit harm. Should the court find at the end of a trial that there was no intentional tort but that there was negligence, it would have to choose between two unsatisfactory alternatives: either dismissing the complaint and thereby indicating that the trial should not have been held in the first place, or granting relief to the plaintiff and thus providing a remedy for damages which is not supposed to be available. Issues also would arise as to whether gross negligence or recklessness is sufficient to support a § 1983 claim.[8] The distinction would in the long run engender disputes about what is fairly pleaded and how to distinguish intentional acts from negligent ones. In the end § 1983 would be a greater burden on federal courts than it is at the present time.

Third, it is almost certain that some negligence claims are within § 1983. For example, if a state failed to comply with the procedural requirements that this Court established in *Wolff* v. *McDonnell*, 418 U.S. 539, for depriving an inmate of good time credit and caused an inmate to serve extra time in prison, that prisoner almost certainly would have a cause of action under § 1983. Once this Court establishes that a person has a right to a pre-

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[8] The Third Circuit gave an affirmative answer in *Davidson* v. *O'Lone*, 752 F.2d 817.

deprivation hearing, a failure to provide that hearing would seem to support a suit under § 1983. The Court has indicated that once a constitutional right is plainly recognized, a § 1983 action will lie against state officials who invade that right. This appears to be the plain meaning of the Court in *Procunier* v. *Navarette*, 434 U.S. at 860.

Petitioner believes that *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, would support the action even if the state's failure to comply were the result of negligence on the part of officials rather than intentional conduct.[9] In that case, the Court found that a § 1983 action would lie where a protected interest was invaded as a result of an "inadvertant" mistake. *Id.* at 426.

Thus, there is nothing in the language or legislative history of § 1983 to suggest that a distinction between negligent and intentional acts was intended by its drafters, and there is good reason to conclude that certain negligence based conduct is undoubtedly within the reach of the statute.

Fourth, there is no need for this Court to create an artificial line between negligence and intentional conduct in order to assure that state courts may have principal jurisdiction over simple tort cases brought against state officials. As long as a state provides a meaningful state remedy, all such cases—i.e., involving intentional conduct and negligence, and involving personal injury and property damage—will be heard exclusively in state court.

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[9] *See also Gregory* v. *Town of Pittsfield*, No. 84-5720, February 25, 1985 (O'Connor, J., dissenting from the denial of certiorari).

D. In Analyzing The Second Essential Element Of A § 1983 Action As Identified By The Court In *Parratt* v. *Taylor* And In Deciding Whether A Constitutionally Protected Interest Is Involved In a Case, Federal Courts May Find Liberty Interests To Be Protected That Are Grounded In Federal, Not State, Law; One Such Interest Is The Right To Personal Safety While In The Custody Of State Officers.

This Court has identified the second essential element of a § 1983 action as focusing on whether the conduct of an officer acting under color of state law deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt*, *supra* 451 U.S. at 534. In previous cases, the Court has indicated that the existence of a property interest often depends on state law. See, e.g., *Board of Regents* v. *Roth*, 408 U.S. at 576-78. In *Parratt* the Court noted that the plaintiff had a right to receive his hobby kit after he was removed from segregation. In *Hudson* the Court assumed that the plaintiff had a right to have certain property in his cell.

Since the rights of prisoners may depend on the statutes and regulations that govern prisons—e.g., *Olim* v. *Wakinekona*, 461 U.S. 238 (1983); *Hewitt* v. *Helms*, 459 U.S. 460 (1983)—it is possible that prison officials might be able to bar prisoners from keeping hobby kits and other personal material in their possession while they are in prison. Assuming that such a bar might be valid if it did not trespass upon First Amendment rights—e.g., *Procunier* v. *Navarette*, 434 U.S. 855; *Bell* v. *Wolfish*, 441 U.S. 520, 553-55 (1979)—or deny fair access to the courts—e.g., *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Bounds* v. *Smith*, 430 U.S. 817 (1977)—a prisoner would have no constitutionally protected interest in his property in prison. A state might choose to permit prisoners to have certain property "at their own risk" in order to

remove from the government any burden of protecting the property. It is not yet plain whether this Court would sustain a regime in which a prisoner would be permitted to keep property that is not constitutionally required to be allowed in prison on the condition that the prisoner agreed to assume any risk of damage to or loss of the property. Petitioner notes that no such regime existed in either *Parratt* or *Hudson*.

Moreover, even if a state could establish an "at your own risk" policy or bar certain property from being kept by prisoners, it cannot escape its responsibility for protecting the person of a prisoner who is involuntarily confined as a punishment for criminal acts. This is the one essential difference between liberty and property insofar as suits for damages arising from tortious conduct by state prison officials are concerned.

Whereas property interests are generally created by force of statute or regulation and often depend upon state law, there are liberty interests that are supported by federal law and that warrant constitutional protection. One such interest is the security of a person who is confined by and is totally under the control of the state. The state may not abdicate its responsibility for protecting the people whom it deprives of liberty and places in custodial confinement.

Immediately after the Civil War, the Thirteenth Amendment was ratified. It provided that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and that "Congress shall have power to enforce this article by appropriate legislation." Three years later, in 1868, the Fourteenth Amendment was adopted. Section 1983 was originally

proposed in 1866 and enacted in 1871. Prior to the enactment of § 1983, the Reconstruction Congress enacted the Civil Rights Act of 1866, which provided in its first section that "all persons born in the United states and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens of every race and color . . . shall be subject to like punishment, pains, and penalties, and to none other, any law statute, ordinance, regulation, or custom to the contrary notwithstanding." This Court has noted that the 1866 statute was enacted to enforce the Thirteenth Amendment. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

The Congress that enacted the 1866 and 1871 statutes was concerned not only about the Klan, but also about "law enforcement agencies of the Southern States." *Allen* v. *McCurry*, 449 U.S. 90, 98 (1980). This is one reason Congress extended the writ of habeas corpus to state prisoners in 1867. *Id.* It is inconceivable that the Congress would have been concerned with the manner in which the states tried and convicted defendants but indifferent to whether the state protected their safety once the prisoners were in state custody—custody which the Thirteenth Amendment recognized as legalized servitude. Petitioner argues that the Congress in 1866 and in 1871 understood that state officers who had complete control over another person had a responsibility for protecting that person and that this responsibility is part of the Due Process that is guaranteed by the Fourteenth Amendment.

This Court recognized the general understanding as to the responsibilities of a custodial officer in *South* v. *Maryland*, 59 U.S. 396 (1856). In that case Maryland sued various individuals, including South, a county sheriff, to recover on behalf of an injured citizen money extorted from him in South's county when South declined to pro-

tect the citizen. Although the court found that no cause of action had been stated under the circumstances, it had occasion to discuss the "four distinct classes" of duties of a sheriff. *Id.* at 401. The Court described the fourth class as follows:

> In his ministerial capacity he is bound to execute all processes issuing from the courts of justice. He is keeper of the county jail, and answerable for the safe-keeping of prisoners. He summons and returns juries, arrests, imprisons, and executes the sentence of the court. . . . (*Id.* at 402).

The Court described the common law approach to liability of a sheriff:

> It is an undisputed principle of the common law, that for a breach of a public duty, an officer is punishable by indictment; but where he acts ministerially, and is bound to render certain services to individuals, for a compensation in fees or salary, he is liable for acts of misfeasance or non-feasance to the party who is injured by them.
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> . . .
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> The history of the law for centuries proves this to be the case. Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. . . . (*Id.* at 402-03).

This remained the common law throughout the nineteenth century. For example, in *State ex rel. Tyler* v. *Gobin*, 94 Fed. 48 (1899), the court stated that "as the lawful custodian of the deceased, he [the sheriff] owed to him the duty of exercising ordinary and reasonable care for his life and health. This duty was due to the deceased personally, and is additional to the duty of safe-keeping which he owes to the public. This duty arose from his having the person of the deceased committed to his custody by virtue of his office." *Id.* at 50.

Although the Thirteenth Amendment recognized that punishment for crime was an acceptable form of involuntary servitude, the Fourteenth Amendment guaranteed that no person would be deprived of liberty without Due Process. Section 1983 enforced the guarantee of the Fourteenth Amendment. This Court has observed that one of the complaints giving rise to § 1983 was that "[s]heriffs, having eyes to see, see not. . . ." *Mitchum* v. *Foster*, 407 U.S. at 225. It is inconceivable that the drafters of § 1983 would have intended to give state officers power over prisoners and deny those prisoners federal protection of their persons and their safety where no state remedy provided protection.

This Court's decision in *Screws* v. *United States*, 325 U.S. 91 (1945), supports petitioner's assertion that the drafters of § 1983 intended that state prisoners would be protected by those responsible for their custody. A majority of the Court, without a majority opinion, assumed that a criminal complaint under the criminal counterpart to § 1983, 18 U.S.C. § 52[10], which charged officials *inter alia* with willfully depriving a person of life without due process, stated an offense. The Court construed the statute to avoid vagueness, but it did not question that a person's right to be protected in his enjoyment of his life (and *a fortiori* liberty) is constitutionally protected when that person is in the custody of officers acting under color of state law. Of course, the conduct in *Screws* was allegedly intentional. But, if this Court concludes, as petitioner urges, that the drafters of § 1983 did not intend to distinguish between kinds of tortious conduct, then *Screws* is important because it recognizes the duty to protect a person in official custody.

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[10] This statute is now 18 U.S.C. § 242.

This Court has continued to recognize the right of a person in special state custody to be free from tortious injury. See, e.g., *Youngberg* v. *Romeo*, 457 U.S. 307, 315-16 (1982); *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977). More generally, the Court has recognized that individuals have liberty interests grounded in federal law. See, e.g., *Vitek* v. *Jones*, 445 U.S. 480, 490-91 (1980).

Thus, petitioner asks this Court to do no more than continue to assure that the state protect those whom it incarcerates by exercising reasonable care to assure their safety.[11] This is the constitutional minimum that any person is entitled to expect and it is part of Due Process.

If this Court continues to recognize that a special duty is owed to one who is in complete control of the state, it may distinguish claims by persons who have no special relationship and no special right to demand protection of their persons. This distinction would help to explain why a prisoner who suffers tortious injuries to his person at the hands of state officers has a right to an adequate remedy whereas other persons may have no such constitutionally guaranteed right to a remedy against arguably tortious conduct by state officials. See, e.g., *Paul* v. *Davis*, 424 U.S. 693 (1976); *Martinez* v. *California*, 444 U.S. 277 (1980).[12]

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[11] Lower federal courts have referred to the relationship between the officer and those in custody as a "special" one. *See, e.g., Wright* v. *City of Ozark*, 715 F.2d 1513, 1516 (11th Cir. 1983). The special relationship is recognized in the RESTATEMENT OF TORTS Second, Vol. 2, § 314A (1965).

[12] This distinction is consistent with the Court's reasoning in *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The Court quoted with approval a state court decision stating that "[i]t is but just that the public be required to care for the prisoner who cannot by reason of the deprivation of his liberty, care for himself." *Id.* at 104. Although the Court

II. THERE IS NO GREATER REASON TO READ § 1983 AS PROVIDING A FEDERAL REMEDY FOR A LIBERTY DEPRIVATION THAN FOR A PROPERTY DEPRIVATION AS LONG AS STATE COURTS AFFORD ADEQUATE, MEANINGFUL REMEDIES FOR DEPRIVATIONS OF BOTH LIBERTY AND PROPERTY.

In his first argument petitioner maintained that liberty interests are entitled to at least the same respect as property interests under § 1983. The question addressed in this second argument is whether liberty interests are so much more important than property interests that a prisoner should be entitled to sue under § 1983 even though a meaningful remedy might be available in state court for tortious conduct of state officials.

There is nothing in the language of § 1983 or in its history to suggest that liberty and property were distinguished by the drafters in a way that would permit a person to sue for a liberty deprivation in federal court but not for a property deprivation which resulted from identical tortious conduct. Indeed, the history of the statute, as noted by this Court in opinions cited above, indicates that the drafters of § 1983 were concerned with the Ku Klux Klan and its looting, burnings and lynchings. In enacting § 1983, the Congress provided protection for property and for people. It is doubtful that the Congress would have wanted to provide a federal forum for a plaintiff to complain that he had been deprived of liberty without

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declined to hold that every claim by a prisoner that he has not received adequate medical care states a violation of the Eighth Amendment, it was careful to note that the state had assured the Court that Texas law permitted prisoners to bring state claims for malpractice by prison physicians. Thus, this Court actually held only that no claim may be brought under § 1983 simply on the basis of negligence for which the state provides a remedy.

Due Process and deny that plaintiff a forum to claim that he also had been deprived of property by the same or similar official acts which deprived him of liberty.

This Court's reading of the legislative history of § 1983 in *Allen* v. *McCurry*, 449 U.S. 90, would appear to reject a view that liberty interests were intended to receive different treatment from property interests. In that case, a defendant in a state court criminal trial filed an action under § 1983 after losing a motion to suppress in the criminal proceeding. This Court held that the doctrine of collateral estoppel barred his federal suit. Although the action involved a claim that state officers had invaded a constitutionally protected expectation of privacy (i.e., protected by the Fourth and Fourteenth Amendments), this Court observed that a "roughly contemporaneous" statute extended the federal writ of habeas corpus to state prisoners and rendered "null and void" state proceedings inconsistent with the decision of a federal habeas corpus court, whereas there was no similar statute suggesting that federal courts should not respect state judgments when constitutional claims have been recognized and fair procedures for determining them have been provided. *Id.* at 98-99 & n.12.

A defendant in McCurry's position has every reason to raise his search and seizure claim in state court, since a failure to raise it will almost surely be a waiver of the claim under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), for purposes of the criminal case. If the defendant raises the claim and loses it, he cannot obtain federal review by way of habeas corpus in most instances. *Stone* v. *Powell*, 428 U.S. 465 (1976). *Allen* v. *McCurry* recognizes the position the defendant is in, but declines to find that a federal forum is necessary for a fair determination of a claim that liberty interests protected by the Fourth and Fourteenth

Amendments have been violated. If a federal forum is not necessary to vindicate such a claim, petitioner believes that § 1983 does not require a federal forum for protection of other interests as long as the state provides adequate, meaningful remedies in state courts.[13]

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[13] Some circuits hold that liberty deprivations attributable to alleged misconduct on the part of state officers give rise to § 1983 actions only if a state fails to provide a meaningful remedy by way of a post-deprivation hearing. *See, e.g., Thibodeaux* v. *Bordelon*, 740 F.2d 329, 336 (5th Cir. 1984) (*Parratt* applies to negligent deprivations of liberty); *Augustine* v. *Doe*, 740 F.2d 322, 327 (5th Cir. 1984) ("finding [a liberty] deprivation, the court must then determine whether the state procedures available for challenging the deprivation satisfy the requirements of due process"); *Gilmere* v. *City of Atlanta*, 737 F.2d 894, 905 (11th Cir. 1984) (court must decide if state's tort remedies satisfy procedural due process requirements); *Haygood* v. *Younger*, 718 F.2d 1472, 1480 (9th Cir. 1983) (distinction between liberty and property is unimportant), *rehearing en banc granted*, 729 F.2d 613 (1984); *Rutledge* v. *Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981) ("*Parratt* . . . provides the guidance [for liberty deprivations] we must accept"), *aff'd on other grounds sub nom., Kush* v. *Rutledge*, 460 U.S. 719 (1983).

Other circuits have refused to extend *Parratt* v. *Taylor* to some or all liberty deprivations. *See, e.g., Wilson* v. *Beebe*, 743 F.2d 342, 348 (6th Cir. 1984) ("*Parratt* has no application where a negligent deprivation of life or liberty has been alleged"); *Vail* v. *Board of Education*, 706 F.2d 1435, 1441 (7th Cir. 1983) (*Parratt* does not control for intentional deprivations of liberty and property), *cert. denied*, 104 S.Ct. 2144 (1984); *Brewer* v. *Blackwell*, 692 F.2d 387, 395 (5th Cir. 1982) ("[W]e decline to give *Parratt* the sweeping interpretation required to encompass the intentional deprivation of liberty involved in this case"); *Wakinekona* v. *Olim*, 664 F.2d 708, 715 (9th Cir. 1981) (*Parratt* does not apply to liberty interests), *rev'd on other grounds*, 461 U.S. 238 (1983).

III. NO MEANINGFUL REMEDY IS CURRENTLY AVAILABLE IN VIRGINIA STATE COURTS FOR NEGLIGENT CONDUCT BY A STATE OFFICER WHO IS NOT BOUND BY STATUTE OR REGULATION TO ACT IN A SPECIFIC WAY.

Throughout this litigation respondent has indicated that he would assert a sovereign immunity defense in state court as well as in federal court. At every stage of the proceedings, respondent has reiterated an intent to rely on sovereign immunity as a defense and an unwillingness to waive the defense. In fact, counsel for respondent was specifically asked by the en banc court of appeals whether respondent was willing to forego reliance on the defense in state court, and counsel gave a negative answer. See *Ausley* v. *Mitchell*, 748 F.2d 224, 227 n.1 (4th Cir. 1984) (en banc) (Winter, C.J., concurring in part) (companion case to petitioner's).

The Attorney General of Virginia joined the brief for respondent in the court of appeals and expressed no doubts concerning the sovereign immunity defense. Assuming that counsel for respondent have proceeded in good faith, they must believe that the sovereign immunity defense is sound. Yet, respondent claims that petitioner nevertheless has an adequate remedy in state court.[14]

If sovereign immunity does apply to this case and no federal action is permitted, then it is plain that petitioner would be denied any protection for his person against tortious acts by state officers—i.e., state courts would

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[14] *Davidson* v. *O'Lone*, 752 F.2d 817, 822 (3d Cir. 1984) (en banc), appears to have reached the opposite conclusion and accepted the argument that sovereign immunity would negate a meaningful remedy and not satisfy due process where a constitutionally protected interest is involved.

provide no remedy and federal courts would deny him a cause of action under § 1983. This would deny petitioner the protection that the drafters of § 1983 intended him to have.

This Court has recognized that the fact that a state court is theoretically available to provide justice does not mean that it is actually available. In *Allen* v. *McCurry*, 449 U.S. at 101, for example, Justice Stewart's opinion for the Court opines that an exception to the holding that federal courts will give collateral estoppel effect to state judgments might be recognized "where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to acknowledge the existence of the constitutional principle on which a litigant based his claim." When the Court held in *Parratt* that a prisoner could not sue under § 1983 for negligent deprivation of property, it limited its holding to situations in which a state provided a meaningful post-deprivation hearing. 451 U.S. at 527. In *Hudson* the Chief Justice found that a federal action under § 1983 could not be maintained because an adequate state remedy existed. 104 S. Ct. at 3205.

Petitioner contends that if sovereign immunity is a bar to suit, he has no state court remedy. "No remedy" cannot be meaningful or adequate within the meaning of *Parratt* and *Hudson*. "No remedy" leaves petitioner with no fair procedure to protect his liberty.

At the time that suit was filed and to this day it appears that Virginia law may well provide a sovereign immunity defense to the respondent.[15] The breadth of the sovereign immunity doctrine in Virginia is illustrated by *Lawhorne*

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[15] A 6-3 majority of the court of appeals held that petitioner had a meaningful remedy in state court, although no judge on the court of

v. *Harlan*, 214 Va. 495, 200 S.E.2d 569 (1973). The personal representative of a former patient alleged that the patient died as a result of negligence in the treatment and care of his injury at the University of Virginia hospital, an organ of state government. He sued the chief administrator, an assistant administrator, and a surgical intern. The Virginia Supreme Court found all immune from suit. Since even the intern exercised "discretion and judgment" he was beyond the reach of tort remedies. One Justice dissented.

Thereafter, the supreme court decided *James* v. *Jane*, 221 Va. 43, 282 S.E.2d 84 (1980), which for a brief time afforded persons injured at the hands of state employees or agents hope that a remedy might be available. James sued to recover for personal injuries suffered in connection with an alleged negligent administration of a myelogram. Another plaintiff, Lawrence, sued to recover damages for a negligent operation. Each defendant was a full time member of the faculty of the University of Virginia Medical School at the time of the alleged negligence. The supreme court reiterated its reasoning in *Lawhorne* that "the use of judgment and discretion" are important to a determination of whether a defendant may claim sovereign immunity. It added another consideration: "the degree of control by the state over the employee whose negligence is involved." It found that there was no immunity because the state's involvement in the treatment of private patients was slight and the doctors were acting in the very same capacities as doctors in private hospitals.

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appeals actually could cite authority establishing that petitioner could reasonably expect to defeat the sovereign immunity defense as it had been recognized by modern decisions of the Virginia Supreme Court.

The court soon made it clear, however, that *James* v. *Jane* was not intended to cut back on the immunity that most state employees could claim. In *Banks* v. *Sellers*, 224 Va. 168, 294 S.E.2d 862 (1982), the court held that a high school student could not sue a division superintendent of schools or a high school principal for negligently failing to protect her safety. The student was cut and stabbed by another student during school hours. The court noted that the defendants had a large number of discretionary and managerial functions in the school and thus were entitled to immunity. Three Justices dissented and argued that the decision could not be reconciled with *James* and that the bench and bar had no consistent rule to follow.

The next year the court decided two cases of significance. The first was *Bowers* v. *Commonwealth*, 225 Va. 245, 302 S.E.2d 511 (1983). The plaintiff sustained injuries when he fell through a culvert-type bridge operated by the State Department of Highways on property that the plaintiff leased. The court rejected the idea that *James* applied and concluded that *James* emphasized that the doctors were essentially private practitioners. 302 S.E.2d at 515. Thus, it found that the resident engineer in charge of the bridge was immune from suit. Six months later in *Hinchey* v. *Ogden*, 226 Va. 234, 307 S.E.2d 891 (1983), the court held that a plaintiff who was injured in an automobile accident could not sue the Superintendent of the Expressway where the action occurred. The court reasoned that even if no state funds were at risk in the case, the plaintiff should not be permitted to sue since suits burdened the state in its governmental function. Not only did the court take an expansive approach to sovereign immunity, but it also stated that "the sovereign is immune not only from actions at law for damages but also from suits in equity to restrain the government from

acting or compelling it to act." 307 S.E.2d at 894. Two Justices dissented and argued that the court's opinions made "an immunity-liability patchwork" of the tort law of Virginia. 307 S.E.2d at 895.

One year later, in *Messina* v. *Burden*, ___ Va. ___, 321 S.E.2d 657 (1984), the court upheld sovereign immunity in an action that is similar to petitioner's case. Messina sued when he tripped and fell on a stairway behind the stage of a college theater. His suit was against the Superintendent of Buildings whose duty it was to maintain and supervise the maintenance of the theater. Another plaintiff sued an official for his injuries when he stepped on a defective manhole cover on a public street. The court rejected attacks on sovereign immunity and boldly declared that the doctrine is "alive and well" in Virginia. Its opinion offers the most expansive language in recent years in explaining the doctrine of sovereign immunity as resting not only on a desire to protect the public purse and avoid litigation, but also on a desire to assure "that citizens will be willing to take public jobs." 321 S.E.2d at 660. Once again the court emphasized the criteria of judgment and discretion in finding that immunity barred suit. Two Justices dissented and argued that "the tent of sovereign immunity is now to be stretched to protect from liability more negligent individuals than ever before. What appears to be the critical test is whether the employee of an immune employer was acting within or without the scope of his employment." *Id.* at 665.[16]

These decisions demonstrate that sovereign immunity is indeed "alive and well" in Virginia. Aside from doctors

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[16] During this entire period, the court decided only one case, *First Virginia Bank-Colonial* v. *Baker*, 225 Va. 72, 301 S.E.2d 8 (1983), in which it rejected a claim of sovereign immunity. A deputy clerk had negligently indexed a deed of trust on the wrong page of an index

who act as private physicians, it appears that virtually any state employee who is called upon to exercise any judgment at all may be immune from suit. Moreover, the immunity now appears to extend to equitable as well as legal claims. It is no wonder that respondent declines to abandon the defense in any state court action.

Respondent may well have exercised some judgment and some discretion in his supervision of stairs at the jail.* But if sovereign immunity bars all actions when state officials are called upon to think, it provides no remedy at all in most cases. A defense as broad as the Virginia sovereign immunity defense is a far cry from the qualified immunity that this Court has recognized. See, e.g., *Procunier* v. *Navarette*, 434 U.S. at 861. The fact is that the state denies relief in precisely those situations in which a reasonable person should not have acted as the defendant did. It falls far short of assuring that reasonable care will be taken to protect the person of an individual who is entrusted to the custody of the state. Thus, it is neither a meaningful nor an adequate remedy.

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book. No one claimed that the negligent act was protected by sovereign immunity; the only question was whether the clerk could be liable for the acts of a deputy. The court found that if the deputy was liable the clerk could be liable under the respondeat superior doctrine.

IV. TO AVOID WASTING SCARCE JUDICIAL RESOURCES AND TO ASSURE THAT A MEANINGFUL, ADEQUATE REMEDY IS PROVIDED FOR PRISONERS WHOSE PROTECTED LIBERTY AND PROPERTY INTERESTS ARE DAMAGED BY TORTIOUS CONDUCT ON THE PART OF OFFICIALS ACTING UNDER COLOR OF STATE LAW, FEDERAL COURTS SHOULD ENTERTAIN ACTIONS UNDER § 1983 WHEN A DEFENSE OF SOVEREIGN IMMUNITY IS RAISED IN STATE COURT UNLESS A DEFENDANT ABANDONS HIS SOVEREIGN IMMUNITY DEFENSE OR THE STATE PROVIDES AN IMMEDIATE AND FINAL MEANS FOR A PLAINTIFF TO ASSURE THAT THE DEFENSE IS UNAVAILABLE.

Petitioner argued in the court of appeals that he might not be heard on the merits in state court because of the doctrine of sovereign immunity, and he asserted that he would litigate in state court but for the sovereign immunity problem. He argued that he would have to exhaust the entire appeals process in state court to overcome the defense and that he therefore had no adequate state remedy. For that reason he sought to proceed under § 1983.

Petitioner argues that it is a bad thing for both state and federal courts if, when a suit is filed under § 1983, a federal court is unable to ascertain whether there is jurisdiction. Is the federal court bound to await the outcome of state proceedings? If so, the dockets of the federal courts may become cluttered with stale cases. It might take years for the state court system to finally rule that sovereign immunity is a defense to a state action. During those years the federal claim would become old. This would be bad for the court system and a poor way to vindicate the right of prisoners to be protected by the officers entrusted with their safety.

This case is a good example of the problem. Years will have passed between the time petitioner was injured and the time when this Court will finally decide petitioner's case. In the interim, respondent has adhered to his sovereign immunity defense. Petitioner has taken respondent at his word and assumed that no remedy would be available in state court; thus, he has sought to keep his (1983) claim alive. He has attempted to avoid having to litigate the same case in two courts.

This is not a unique case. Every prison inmate similarly situated to petitioner may be required to litigate in both state and federal courts simultaneously as a result of state sovereign immunity law. Otherwise, the failure to bring a prompt federal claim might result in the running of the statute of limitations. See *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980).[17] Unless a federal court is able to make a determination as to the propriety of an action under § 1983 at the beginning of a suit, scarce judicial resources, both federal and state, will be wasted. And prisoner plaintiffs will be bounced between federal and state courts with neither anxious to proceed to resolve

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[17] 2 Code of Virginia, § 8.01-243 (1984 Replacement Vol.) established a two year statute of limitations for personal injuries. *See Burnett* v. *Grattan*, ___ U.S. ___, 104 S.Ct. 2924, 2928-33 (1984) (discussing applicability of state statute to federal actions). Section 8.01-2 declares that "a person convicted of a felony during the period he is confined" is a "person under a disability." Generally, such a person must sue by having a guardian ad litem bring the action. (§ 8.01-9). Under previous Virginia law, a prisoner needed a committee to bring an action on his behalf, although the prisoner could waive the appointment of a committee. *Dunn* v. *Terry*, 216 Va. 234, 217 S.E.2d 849 (1975). It is unclear whether the prisoner can sue at the present time without a guardian, and it appears that the statute of limitations is not tolled during the period when a prisoner has no guardian or when an action is pending in another court. (§ 8.01-229).

complaints that liberty and property have been damaged.[18]

The wasted resources associated with uncertainty are self-evident. Lower courts have struggled to find a solution. One example is *Brooks* v. *Dutton*, 751 F.2d 197 (6th Cir. 1985). A prisoner complained that his personal property had been taken from his cell while he was hospitalized. He pursued state administrative remedies and filed a federal action. The district court dismissed the complaint as frivolous, and the court of appeals agreed that after *Parratt* the complaint was frivolous. The court took judicial notice of Tennessee's tort claims procedures, which appeared to provide an adequate remedy. It then held that "if state remedies exist and have not been exhausted, there is no cause of action under § 1983, unless plaintiff pleads and proves that state remedies are inadequate." *Id.* at 199. The problem is that a plaintiff cannot show that the remedies are inadequate in many instances without actually litigating throughout the state court system, while keeping a federal claim in reserve in case the remedies are, in fact, inadequate.

Petitioner suggests that when a state has a broad rule of sovereign immunity and that rule is invoked as a defense in a state court action, a federal court should entertain a suit by a prisoner complaining of injuries to person or property attributable to negligent or intentional acts by prison officers unless the sovereign immunity defense is waived when the federal suit is filed, or the state provides some immediate and final means for the plaintiff to assure that the defense will not be honored in state court. As long as a federal court is confident that the

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[18] Even if a suit was heard in state court, a general verdict might not indicate whether a state officer won on the merits or as a result of sovereign immunity. A federal court might have great difficulty in ascertaining whether the plaintiff had a meaningful remedy.

immunity defense will not be recognized in state court and that the state action may proceed, the federal action may and should be dismissed.

There are many ways for a state to provide definite rules regarding sovereign immunity. Statutes or regulations could provide that certain classes of employees are not immune from suit for negligent acts. Sovereign immunity could be abrogated altogether or in large part.[19] The state could provide that sovereign immunity may only be raised if approved by the Attorney-General, who would have to decide whether or not to permit the defense at the time a federal action is filed. Such a determination could be made final and binding on state employees.

If a prisoner's right to be secure in his person is to be protected, a remedy must be available at a meaningful time. A meaningful remedy is one that is proximately related to the events giving rise to it. The burden should be on the state official who claims that there is a meaningful, adequate state remedy to demonstrate that there is. Unless the official does so, the federal action should proceed.

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[19] Virginia has adopted a tort claims act. Va. Code § 8.01-195.1 et seq. (1984 Replacement Vol.). It will permit some, but not all actions, that would have been barred by sovereign immunity. It has no application to acts occuring before July 1, 1982. The statute limits claims to $25,000 and preserves the sovereign immunity of individuals that has been created by the Virginia Supreme Court. (§ 8.01-195.3). The act should offer clear guidance in some suits. But there is a real danger that the act could be amended to exclude suits by prisoners should this Court hold, as the court of appeals did, that a state has no obligation to provide a remedy for personal injuries. It is unclear whether the act included prisoner suits because the state wanted to give prisoners a remedy or because it feared that it had to and preferred, to see the remedy come in state court. Thus, this Court's judgment may well affect the future of the state act.

V. CONCLUSION

Cases like this one should be in state court. But, in a state court respondent would rely upon his sovereign immunity defense. That defense stands in the way of having the merits of the claim heard. Unless the merits can be heard, there is no way for petitioner to hold the state to its duty to protect him while he is in custody.

Petitioner prays that this Court will permit his action to proceed in federal court because the respondent failed, despite having many chances to do so, to abandon a sovereign immunity defense. Without a federal remedy, there is no assurance that petitioner will have an opportunity to be heard on the merits of his claim in state court. This is why petitioner has maintained throughout this litigation that the state has not offered him an adequate, meaningful remedy in state court. Throughout this litigation respondent has asserted that petitioner, in fact, has no right to recover in state court because respondent is immune from suit.

This is a case in which petitioner is entitled to a remedy if he can prove negligence. Unfortunately, it must be a federal remedy under § 1983 because the state cannot assure that a state remedy is available. Thus, petitioner

asks this Court to reverse the judgment of the court of appeals and to remand his case to the district court with directions to consider the merits of the complaint.

Respectfully submitted,

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No. 84-5872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Roy E. Daniels,

Petitioner,

v.

Andrew Williams,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that an injury to a jail inmate's person as the result of an act of simple negligence by a deputy sheriff of the Commonwealth of Virginia is not a protectable liberty interest under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the Court of Appeals erred in holding that even if such an interest in general exists, or such a deprivation might in general occur, any such deprivation would not be without due process because the Commonwealth provides an adequate post deprivation remedy in the form of a traditional common law personal injury negligence action.

3. Whether the Court of Appeals erred in holding that an adequate postdeprivation remedy was available to a jail inmate who alleged personal injuries resulting from the simple negligence of a deputy sheriff of the Commonwealth of Virginia without reaching the question of whether or not the existence of a possible immunity defense should permit the action to be maintained under 42 U.S.C. § 1983.

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STATEMENT OF THE CASE

The petitioner was an inmate in the Richmond City Jail on January 23, 1982. (J.A. 6). The respondent was a deputy of the Sheriff of the City of Richmond, appointed as such pursuant to Virginia law. The petitioner alleges that on January 23, 1982, while en route to the jail dining hall, he slipped on a pillow that had been left on the stairs by the respondent, the deputy in charge of the building. (J.A. 6). Petitioner brought his action pursuant to 42 U.S.C. § 1983 on a pre-printed form provided at the Richmond City Jail for that purpose, and filed the form with the Clerk of the United States District Court for the Eastern District of Virginia. He indicated on the § 1983 form that he had not begun any other actions in state or federal court dealing with the same facts involved in this action. (J.A. 5).

Petitioner alleged in his suit that he injured his back and ankle. Furthermore, he alleged that although he was examined and treated by a doctor, he suffered back pains at the time the suit was filed. (J.A. 6).

The United States District Court for the Eastern District of Virginia held that petitioner's claim was not actionable under § 1983 since the Due Process Clause required only a meaningful postdeprivation remedy and Virginia law provided such a remedy in the form of a common-law negligence action. (J.A. 20). A panel of the United States Court of Appeals for the Fourth Circuit agreed. (J.A. 31). The court of appeals, however, granted a rehearing *en banc*.

The majority of the court of appeals held that the negligent injury to the petitioner's person was not a protectable liberty interest under the Due Process Clause and his complaint did not state a cause of action under § 1983 on that account (J.A. 35). Furthermore, the court of appeals held that even if petitioner were deprived of a liberty interest protected by the Fourteenth Amendment, the deprivation was not without due process of law under *Parratt v. Taylor*, 451 U.S. 527 (1981), because a postdeprivation remedy was available in the state courts in the

form of a traditional common law personal injury negligence action. (J.A. 36). The *en banc* court did not reach the question of whether the existence of a possible immunity defense should permit the action to be maintained under § 1983. (J.A. 37).

Contrary to the point asserted by petitioner (Brief of Petitioner 3), respondent was not represented in the brief in the court of appeals by the Attorney General of Virginia, and it was not asserted on his behalf that he would rely in both state and federal court upon sovereign immunity. (J.A. 22).

SUMMARY OF THE ARGUMENT

The Court of Appeals properly concluded that this Court's decision in *Parratt v. Taylor* did not establish a cause of action under 42 U.S.C. § 1983 for personal injuries such as those allegedly suffered by petitioner. *Parratt* involved only the negligent loss by prison officials of a prisoner's personal property. Since the petitioner's claim involves an allegation of simple negligence resulting in personal injury, the respondent believes that the limiting language in *Parratt* precludes its application to this case. An extension of *Parratt* to include deprivation of a liberty interest will extend the case beyond its logical bounds.

Should the *Parratt v. Taylor* analysis be applied to liberty interests, respondent believes that something more than mere negligence is required to support a § 1983 claim based on the Fourteenth Amendment's Due Process Clause. The suggestion in *Parratt* that such negligence would be sufficient does not accord with this Court's prior decisions involving § 1983 and has created confusion among the lower federal courts as to the proper way to analyze claims such as petitioner's.

Respondent believes that his alleged actions were *at most* negligent under state law. Such negligence lacks the outrageousness or abuse of official power which respondent believes necessary to raise his conduct to the level of a deprivation of a substantive due process right. Respondent further urges that petitioner's status as a jail inmate

is not a sufficient reason to relax the standards by which such deprivations are judged.

In this case, petitioner has alleged nothing more than a violation of a state law duty of care. If such claims are permitted to reach federal court via the due process arguments advanced by petitioner, respondent believes that much of the separation between state and federal jurisdiction will evaporate, and that § 1983 will create a new body of tort law incompatible with the several states' existing tort law systems.

In the event that this Court determines that the injury to petitioner proximately caused by the alleged negligence of respondent constitutes the deprivation of a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, respondent urges this Court to decide that an adequate postdeprivation remedy provided by state law satisfies the requirements of due process.

Respondent urges this Court to establish a clear rule for determining when a state remedy is adequate. Respondent argues that a state remedy should be deemed adequate and meaningful if state law provides the injured party with the opportunity for a hearing before a court or other tribunal with the power to grant a remedy.

On the other hand, the minimum requirements of procedural due process do not require that the injured party always receive the same compensation in state court that he would have received if he had been allowed to utilize § 1983.

Respondent acknowledges that state law affirmative defenses such as sovereign immunity, contributory negligence, or comparative negligence, and other procedural and substantive rules of state law may prohibit a plaintiff from receiving the same compensation which he might have received if § 1983 had been available to him. However, it is incorrect to argue that a lack of compensation in the state court action invariably means that the state court action is inadequate for purposes of the Due Process Clause of the Fourteenth Amendment.

Respondent urges that the proper analysis of whether a possible affirmative defense makes the state remedy inadequate is to determine whether the affirmative defense is wholly arbitrary or irrational as applied to the case in question. If the use of the affirmative defense in the state court action would result in an arbitrary or irrational conclusion as applied in that case, then the state remedy would be inadequate and the plaintiff would be allowed to proceed with an action in federal court under § 1983. On the other hand, if the affirmative defense rationally furthered a reasonable state interest, then the state cause of action would satisfy the minimum requirements of procedural due process.

Respondent believes that establishing a clear rule regarding the adequacy of a state remedy is important in maintaining the efficiency of the federal judicial system. It is likely that many plaintiffs will still file actions in federal court under § 1983 notwithstanding an available state cause of action if the plaintiffs are able to identify potential state law affirmative defenses which may deny the plaintiffs the same compensation which they would receive under § 1983. The "wholly arbitrary or irrational" test described above would allow the federal courts to efficiently address the adequacy of the available state remedies.

Respondent argues that allowing rationally-based affirmative defenses to limit or proscribe compensation to some plaintiffs in state court actions does not violate the meaning of § 1983 as interpreted by this Court. This Court has ruled that prison officials may claim a qualified, "good faith" immunity in § 1983 cases. While the federal qualified immunity is not a mirror image of the state sovereign immunity, the results are often the same since in both cases some injured plaintiffs are not compensated and some public officials are shielded from liability for their negligent acts or omissions.

Finally, respondent argues that if a state court were to rule that sovereign immunity was available to respondent, sovereign immunity would not be wholly arbitrary or irrational as applied to the facts of this case.

ARGUMENT

I. THE COURT OF APPEALS' DECISION THAT AN INJURY TO A JAIL INMATE'S PERSON AS THE RESULT OF AN ACT OF SIMPLE NEGLIGENCE BY A DEPUTY SHERIFF OF THE COMMONWEALTH OF VIRGINIA IS NOT A PROTECTABLE LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS CONSISTENT WITH THIS COURT'S DECISION IN *PARRATT V. TAYLOR*.

The *en banc* opinion in *Daniels v. Williams*, 748 F.2d 229 (4th Cir. 1984), properly held that *Parratt v. Taylor*, 451 U.S. 527 (1981) applied only to a deprivation of property interests and not to a deprivation of liberty interests. *Parratt* involved the negligent loss by state prison officials of a prisoner's "hobby kit" and this Court held only that an inadequate remedy in a state court was a minimum requirement to invoke 42 U.S.C. § 1983. 451 U.S. at 544. The last paragraph of the opinion of the Court in *Parratt* contained the example of an automobile accident involving a state official and concluded that such a case—presumably involving personal injury—is not covered by the Due Process Clause of the Fourteenth Amendment or § 1983. *Id.*

The present case involves an allegation of simple negligence resulting in personal injury. In effect, the only issue setting this case apart from any other common-law type tort case is that the alleged act of simple negligence involved a deputy sheriff of the City of Richmond and an inmate in the Richmond City Jail. This Court limited *Parratt* by not including bodily injuries resulting from negligent actions of state officials. *Parratt*, 451 U.S. at 544.

In a later case, the Court recognized this limitation and chose to extend this reasoning only to include intentional as well as unintentional property interest violations. *Hudson v. Palmer*, 468 U.S. ___, 82 L.Ed.2d 393, 407

(1984). Therefore, at present, given the limiting language in the opinion of the Court, *Parratt* applies only to property interests, and any attempt to include liberty interests extends the case past its logical bounds.

II. A PERSONAL INJURY ALLEGEDLY SUFFERED AS A RESULT OF A DEPUTY SHERIFF'S SIMPLE NEGLIGENCE IS NOT A CONSTITUTIONAL DEPRIVATION OF LIBERTY ACTIONABLE UNDER 42 U.S.C. SECTION 1983.

A. *Negligent Acts By State Officials Do Not Amount To A Violation Of The Substantive Guarantees Of The Due Process Clause.*

Assuming *arguendo* that the *Parratt v. Taylor* analysis applies to liberty interests, petitioner, whose injury allegedly resulted from a deputy sheriff's negligence, has not been deprived of a constitutionally protected liberty interest. A constitutional deprivation "connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss." *Parratt*, 451 U.S. at 548 (Powell, J., concurring). *See also Procunier v. Navarette*, 434 U.S. 555, 568 (1978) (Burger, C.J., dissenting) ("Neither the language nor the legislative history of § 1983 indicates that Congress intended to provide remedies for negligent acts"). Before *Parratt*, this Court had never suggested that mere negligence would support a § 1983 claim.

Section 1983 was enacted in 1871 as one of the statutes intended to implement the Fourteenth Amendment. The Congress was concerned with the influence of the Ku Klux Klan on Southern law enforcement agencies, and possibly other intentional or grossly negligent acts perpetrated by those enforcement officials. *Allen v. McCurry*, 449 U.S. 90, 98 (1980).

Prior to *Monroe v. Pape*, 365 U.S. 167 (1960), § 1983 remained a little known, little-used section of the United States Code, as most civil rights litigation against state officers before that time was brought under 18 U.S.C. § 242, the criminal counterpart to § 1983. *Parratt*, 451 U.S. at 553 n. 13 (Powell, J., concurring); *Davidson v. O'Lone*, 752 F.2d 817, 823 (3d Cir. 1984), *cert. pending* (filed March 29, 1985).

Monroe involved an allegedly illegal (warrantless) search, seizure and detention which the plaintiffs alleged deprived them of their "rights, privileges and immunities secured by the Constitution...." 365 U.S. at 170. The *Monroe* Court held, *inter alia*, that because § 1983, unlike § 242, does not contain the word "willfully," § 1983 plaintiffs need not establish willfulness, which the Court defined as the "specific intent to deprive a person of a federal right." *Id.* at 187. While the officers in *Monroe* may not have intended to deprive the plaintiffs of a federal right, they did—unlike the deputy sheriff in the instant case—intend to commit the specific acts alleged.

While the *Monroe* Court declined to impose the § 242 "willfulness" gloss on § 1983, neither did it suggest that mere negligence by a state official would support a § 1983 claim. Decisions of this Court subsequent to *Monroe* confirm the Court's rejection of the notion that all common law torts committed by public officials acting under color of state law *ipso facto* constitute violations of § 1983.

In *Paul v. Davis*, 424 U.S. 693 (1976), the police circulated the plaintiff's picture, identifying him to area merchants, including his own employer, as an "active shoplifter." 424 U.S. at 694-696. The plaintiff sued under § 1983, alleging that circulation of the picture and accompanying description defamed him by damaging his reputation. Rejecting the plaintiff's contentions, the Court held specifically that the alleged injury to the plaintiff's reputation did not involve a special liberty or property interest invoking Fourteenth Amendment Due Process simply because it was perpetrated by a public official. 424 U.S. at 712. The State's status as an alleged tortfeasor does not, by itself, sustain a § 1983 claim.

> ...[T]he Due Process Clause of the Fourteenth Amendment and § 1983 [do not automatically] make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims....

> [S]uch a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.

Paul, 424 U.S. at 699, 701.

Writing for the Court in *Paul*, Justice Rehnquist relied upon this Court's decision in *Screws v. United States*, 325 U.S. 91 (1945), a case brought under 18 U.S.C. § 242 and involving actions by police officers while making an arrest, where Justice Douglas wrote for the plurality:

> Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.

Id. at 108-09 (quoted in *Paul v. Davis*, 424 U.S. at 700).

In a case decided later in the same year as *Paul v. Davis*, the Court reiterated that not all torts of state officials are actionable under § 1983.

In *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), the Court held that medical malpractice does not become a constitutional violation simply because the victim is a prison inmate. The Court concluded that the mistreatment allegedly suffered by the plaintiff constituted nothing more than ordinary medical malpractice, which was actionable only under state law, and not under federal law. *Id.* at 108. In order to state a cognizable claim under § 1983 for malpractice, the Court concluded that "acts or omissions sufficiently harmful to *evidence deliberate indifference* to serious medical needs" would have to be alleged. *Id.* at 106 (emphasis added).

These cases indicate that something more than mere negligence is required to support a denial of due process action under § 1983. Before deciding *Parratt*, this Court

twice granted certiorari expressly to decide this question. Both times, however, the Court found it unnecessary to decide the issue. *Procunier v. Navarette*, 434 U.S. 555 (1978) (defendants entitlement to qualified immunity rendered negligence issue moot); *Baker v. McCollan*, 443 U.S. 137 (1979) (false imprisonment not a deprivation of a constitutional right where officer acted on basis of valid warrant).

Baker, however, is instructive. In discussing what acts would support a § 1983 claim, Justice Rehnquist, again writing for the Court, noted:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.

Baker, 443 U.S. at 146.

Nothing in this Court's decisions through *Baker* directly supports the principle that negligent conduct by a state official causing injury to someone constitutes a deprivation of a Constitutional right which can be redressed in a § 1983 suit. In fact, the pre-*Parratt* cases evince the Court's concern that the Fourteenth Amendment and § 1983 not become a "font of tort law to be superimposed" upon the several states' existing tort law systems. *Paul*, 424 U.S. at 701. These cases caution that only violations of Constitutional rights, *not* violations of duties of care imposed by state tort law, are actionable under § 1983. *Baker*, 443 U.S. at 146. *See also Estelle*, 429 U.S. 97, 106.

In order to violate a federal right, official conduct must exceed a minimum level, below "which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). Prior to *Parratt*, simple negligence did not exceed that minimum level, any more than did medical malpractice or defamation. The petitioner's claim is based upon allegations of simple negligence, and Virginia has long provided a forum for trying such claims. Petitioner does not claim that a state official acted with a specific willful intent, or with reckless and deliberate indifference, and he does not allege a violation of a substantive guarantee of the Due Process Clause.

This Court sought in *Parratt* to provide a framework which would assist lower federal courts in analyzing claims, such as petitioner's, which allege facts commonly thought to state a "common law tort [claim] normally dealt with by state courts, but instead [are] couched in terms of a constitutional deprivation and [seek] relief ... under § 1983." *Parratt*, 451 U.S. at 533. *Parratt*, however, has apparently not provided that guidance.

B. *The Most Logical Interpretation Of Parratt v. Taylor Affirms The Proposition That Something Greater Than Negligence Is Required To Support An Action Under Section 1983 For Denial Of Due Process.*

Parratt has created confusion among the Circuit Courts,[1] but two recent decisions support the contention that *Parratt v. Taylor* did *not* reverse the trend of requiring more than simple negligence to invoke due process protection under § 1983. *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983); *Davidson v. O'Lone*, 752 F.2d 817, 835 (3d Cir. 1984). In *Jackson*, a police officer's failure to aid in rescue or to properly direct firemen to an accident scene was alleged to have exacerbated accident victims' injur-

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[1]The Third Circuit, in *Davidson v. O'Lone*, 752 F.2d 817 (3d Cir. 1983), *cert. pending* (filed March 29, 1985), concluded that *Parratt* did apply to liberty interests, but negligence did not invoke constitutional protection. The Fourth Circuit, in *Daniels v. Williams*, 748 F.2d 229 (4th Cir. 1984), *cert. granted* (February 19, 1985), held that *Parratt* does not apply to liberty interests. The Fifth Circuit, in *Thibodeaux v. Bordelon*, 740 F.2d 329, 337 (5th Cir. 1984), held that *Parratt* applies to liberty interests, but in *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984), stressed that only "protected interests" require due process protection. The Sixth Circuit, in *Wilson v. Beebe*, 743 F.2d 342, 350 (6th Cir. 1983), held that *Parratt* does not apply to life or liberty interests, but that a substantive violation of a constitutional right would still invoke due process protection. The Seventh Circuit, in *Jackson v. City of Joliet*, 715 F.2d 1200, 1206 (7th Cir. 1983), held that neither negligence nor gross negligence satisfied a due process claim under the Fourteenth Amendment. The Eighth Circuit, in *Mills v. Smith*, 656 F.2d 337 (8th Cir. 1981), held that negligence will not necessarily give rise to a constitutional deprivation. The Ninth Circuit, in *Wakinekona v. Olim*, 664 F.2d 708, 715 (9th Cir. 1981), *rev'd on other grounds*, 461 U.S. 238 (1983), held that *Parratt* does not apply to liberty interests, but later in *Haygood v. Younger*, 718 F.2d 1472, 1478 (9th Cir. 1983), in an Eighth Amendment context, said that distinctions between liberty and property were unimportant. The Eleventh Circuit, in both *Gilmere v. City of Atlanta*, 737 F.2d 894, 951 (11th Cir. 1984) and *Wright v. City of Ozark*, 715 F.2d 1513, 1516 (11th Cir. 1983), implied that even reckless disregard would not invoke due process protection, unless a substantive constitutional right had been violated.

ies. The victims' estates sued under § 1983; however, the court held that negligence, or even gross negligence, in a rescue attempt did not state a due process violation under the Fourteenth Amendment, and remanded the case with instructions to dismiss the action. *Id.* at 1206.

In *Davidson*, a prisoner was attacked by another prisoner who had previously threatened him. Although Davidson informed prison officials of the threat, he admitted to attaching little significance to it. Prison officials took no steps to protect him. 752 F.2d at 819.

The prisoner in *Davidson* was foreclosed from recovery under state law; therefore, he sued in federal district court claiming a violation of due process and invoking § 1983. Based on its interpretation of *Parratt*, the District Court awarded summary judgment in his favor. *Id.* at 817. The Third Circuit sitting *en banc*, however, reversed and directed entry of judgment for defendants. *Id.* at 831.

While concluding that the prisoner did have a liberty interest in not being attacked, the court also held that the prison officials' conduct only constituted negligence, and "negligence claims are not encompassed within § 1983." 752 F.2d at 826. After an extensive review of this Court's § 1983 decisions prior to *Parratt*, the *Davidson* court concluded:

> ...nothing in the Court's cases through [*Baker v. McCollan* in] 1979 provides any support for the principle that negligent conduct by a state official causing injury to a person constitutes a deprivation of a Fourteenth Amendment right which can be redressed in a § 1983 suit.

Id. at 825.

Upon examining *Parratt*, the *Davidson* court acknowledged that, standing alone, some language in the opinion, *see* 451 U.S. at 534-35, could be interpreted as concluding that mere negligence can constitute a deprivation redressable in a § 1983 action. 752 F.2d at 826. Viewing this

language, however, in the context of this Court's prior decisions involving § 1983, the *Davidson* court concluded that *Parratt* did not so hold. *Id.*

While the *Davidson* court declined to prescribe a litmus test for determining which factual situations would support § 1983 claims, the court did discern a pattern from earlier cases involving that statute. After discussing a variety of cases[2] from other circuits, the court concluded that actions may be brought in federal court under § 1983 when there has been infringement of a liberty interest by "intentional conduct, gross negligence or reckless indifference, or an established state procedure." 752 F.2d at 827, 828.

> The essential element of a § 1983 action is abuse by a state official of his or her official position ....
>
> When the only finding is that of mere negligence, as here, we cannot find the "outrageousness" or abuse of official power that warrants raising the tortious conduct of the [defendant] to the level of a deprivation of constitutional right within the scope of § 1983.

Id. at 827, 829 (citations omitted).

Respondent believes, as did the *Davidson* court, that *Parratt* did not explicitly reverse this Court's earlier decisions which indicate that more than mere negligence is required to sustain a § 1983 claim. Since mere negligence is the sole basis for petitioner's § 1983 claim, respondent urges that the " 'outrageousness' or abuse of official power" that might warrant raising the deputy sheriff's

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[2] *E.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (established state procedure); *Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir. 1983) (jail administered in a manner virtually indifferent to prisoners' safety); *Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30 (1983) (deliberate or reckless indifference to prisoner's safety); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982).

conduct to the level of deprivation of a constitutional right is lacking. *Davidson*, 752 F.2d at 829. *See also Parratt*, 451 U.S. at 549 (Powell, J., concurring) (Section 1983 "enacted to deter real *abuses* by state officials in the exercise of governmental powers" [emphasis in original]).

Respondent believes that petitioner did not suffer a deprivation of a constitutionally protected interest, and therefore suggests that nothing has occurred to trigger an inquiry as to what process is due. Petitioner's status as a jail inmate is not a sufficient reason to relax the standards by which constitutional deprivations are judged.

C. *Petitioner's Status As a Jail Inmate Does Not Justify Relaxing The Standard Of Conduct Necessary To Support A Section 1983 Claim.*

Underlying petitioner's position is the apparent assertion that his status as a jail inmate somehow modifies the parameters within which § 1983 claims are analyzed. A prisoner, however, should not be afforded greater rights and legal remedies by virtue of his incarceration than an ordinary citizen would receive in a similar situation. Certainly this Court has never suggested such a proposition.

In *Paul*, the Court hypothesized that a bystander shot by a policeman or injured by a sheriff driving a government vehicle would not necessarily have a claim under § 1983. 424 U.S. at 698. Similarly, in *Estelle v. Gamble*, the Court concluded that medical malpractice does not become a constitutional violation "merely because the victim is a prisoner." 429 U.S. at 106. An injury should not warrant a § 1983 claim just because the tortfeasor is a state official and the victim is an inmate.

In the present case, petitioner slipped and fell on pillows and newspapers left on some jail stairs by a deputy sheriff. Such an injury could befall any ordinary citizen. Had respondent negligently left trash on the stairs of a citizen's apartment building, that citizen probably would not have an actionable § 1983 claim for any resulting injury. *See Paul*, 424 U.S. at 701; *Estelle*, 429 U.S. at 106; *Baker*, 443 U.S. at 146. Petitioner seemingly would not be able to recover under § 1983 as an ordinary private citizen, and should not be afforded any special legal remedies because of his incarceration in a local jail.

D. *The Court Is Urged To Clarify The Requirements To Be Met For Stating A Due Process Violation Cognizable Under Section 1983 To Be That The Injury Resulting From State Action Must Be The Result Of Official Action Constituting Something More Than Mere Negligence And That The State Remedy Is Inadequate.*

The Court should clarify that the adequacy or inadequacy of a state remedy is only a secondary requirement for recognition of what constitutes a constitutional tort claim under 42 U.S.C. § 1983. The Court should specify that a plaintiff, to maintain an action under § 1983, must first demonstrate that the injury was the result of something greater than mere negligence.

In *Parratt*, the Court set forth two requirements to state a § 1983 action: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." 451 U.S. at 535. The Court, of course, held that procedural due process was not violated as long as there was an adequate state remedy. *Id.* at 543. Petitioner believes that the Court should clarify its earlier decisions[3] and state that despite the adequacy or inadequacy of the state remedy, a violation of a substantive due process right is required to invoke procedural due process protection under the Fourteenth Amendment. Only injuries which are the result of willful or recklessly indifferent abuses of official position by state officials should constitute substantive violations of the Due Process Clause. Allowing claims based only upon simple negligence to reach federal court via a procedural due

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[3] *Paul v. Davis*, 424 U.S. 693; *Estelle v. Gamble*, 429 U.S. 97; and *Baker v. McCollan*, 443 U.S. 137 all imply that something greater than mere negligence in a tort-type action is required to maintain an action for alleged deprivation of due process.

process argument would result in "any meaningful separation between federal and state jurisdiction" ceasing to hold, and "forum shopping" becoming "the order of the day." *Roy v. City of Augusta, Maine*, 712 F.2d 1517, 1523 (1983).

Respondent believes that the Court must establish a requirement of willful or recklessly indifferent official action to invoke federal protection under the Due Process Clause and § 1983, or risk opening the federal courts to a plethora of simple tort actions, which the states, in consideration of their own sovereign interests, have chosen to limit.

III. THE COMMONWEALTH OF VIRGINIA PROVIDES AN ADEQUATE POSTDEPRIVATION REMEDY FOR THE ALLEGED NEGLIGENT DEPRIVATION OF PETITIONER'S LIBERTY INTEREST NOTWITHSTANDING THE DOCTRINE OF SOVEREIGN IMMUNITY.

In *Parratt*, this Court held that the Due Process Clause of the Fourteenth Amendment is not violated when a public employee, by means of a random and unauthorized act, negligently deprives an individual of property, provided the state makes available an adequate post-deprivation remedy. In *Hudson*, this Court extended the *Parratt* analysis to cases involving the intentional deprivation of property by a public employee by means of a random and unauthorized act.

In the event that this Court decides that the alleged tortious injury suffered by petitioner through the negligence of respondent constitutes the deprivation of a liberty interest which is protected by the Fourteenth Amendment, there does appear to be a logical reason why the *Parratt* analysis should not apply to the negligent deprivation of a liberty interest as well as a property interest. *See, e.g., Thibodeaux v. Bordelon, supra; Augustine v. Doe, supra; Gilmere v. City of Atlanta, supra.* Petitioner does not argue that the *Parratt* analysis should not apply to the negligent deprivation of a liberty interest. Brief for Petitioner 26-28. Petitioner also does not dispute that Virginia's tort law would allow him to file suit against respondent in state court.

Although the *en banc* court of appeals did not reach the question of whether the existence of a possible sovereign immunity defense should permit the case to be maintained under § 1983, 748 F.2d at 232, respondent believes that it would be appropriate for this Court to consider the matter since it has a great impact on when a state remedy is "adequate" for purposes of *Parratt*.

If the due process analysis set forth in *Parratt* and extended by *Hudson* was intended to clarify for potential

plaintiffs and the federal courts when certain cases may proceed under § 1983 and when other cases may not, the intended clarification will not be achieved in most instances until guidance is provided regarding when a state remedy is "adequate" for purposes of *Parratt*. Petitioner insists that if sovereign immunity were determined to apply to the present case in a state court action, then petitioner would have no adequate, meaningful remedy. Brief of Petitioner, 29-30. Petitioner relies upon dictum in the *en banc* decision in *Davidson v. O'Lone* for the argument that sovereign immunity necessarily negates a meaningful remedy. 752 F.2d at 822.[4]

Petitioner contends that because sovereign immunity may prevent petitioner from receiving actual compensation from respondent for petitioner's injury, this means that petitioner has no state court remedy. Respondent contends that if the argument that "no actual compensation" always constitutes "no remedy," then *Parratt* and *Hudson* may have very limited utility in referring to state courts most cases based on the deprivation of protected interests by the random and unauthorized acts of a public employee. After all, sovereign immunity is not the only affirmative defense which prevents an injured party from

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[4]The United States District Court for the Eastern District of Virginia has reached the contrary conclusion in four recent cases. *Groves v. Cox*, 559 F. Supp. 772 (E.D. Va. 1983) (negligent deprivation of property; held that, notwithstanding possible availability of bar of sovereign immunity, state's postdeprivation remedies provide plaintiff the opportunity for a fair hearing and therefore adequately comply with procedural due process requirements); *Holmes v. Wampler*, 546 F. Supp. 500 (E.D. Va. 1982) (negligent deprivation of liberty interest; held that bar of sovereign immunity available to defendants would not entail that Virginia state courts had accorded insufficient procedural due process protections); *Frazier v. Collins*, 544 F. Supp. 109 (E.D. Va. 1982) (negligent deprivation of property; held that availability of immunity to defendants would not render Virginia's postdeprivation remedies inadequate or unmeaningful); *Irshad v. Spann*, 543 F. Supp. 922 (E.D. Va. 1982) (negligent deprivation of property; held that possibility of a sovereign immunity defense for defendants would not deprive plaintiff of due process in the state courts).

receiving actual compensation in a state court action. The doctrine of contributory negligence also would prevent an injured party from receiving actual compensation in a Virginia court. *See Chesapeake & Ohio Railway Co. v. Butler*, 179 Va. 609, 611, 20 S.E.2d 516, 518 (1942) (plaintiff is not entitled to recover where plaintiff so far contributed to his injury by his own negligence that but for such negligence the injury would not have occurred). If, in the present case, the petitioner sued in state court and was found contributorially negligent and, thus, received no compensation, would his state remedy be inadequate? In other words, if "no actual compensation" invariably equates with "no adequate remedy," then *Parratt's* analysis will have very limited application since it would appear that nearly every state cause of action, under certain facts and circumstances, might yield no actual compensation for an injured party. Surely this was not what this Court intended in deciding *Parratt*.

Respondent contends that petitioner has misconstrued the meaning of the Due Process Clause of the Fourteenth Amendment. Petitioner erroneously argues that the failure of a plaintiff in a state court action to receive full compensation for the deprivation of a protected interest by the random and unauthorized act of a public employee invariably means that the state court remedy is inadequate for purposes of the Fourteenth Amendment and *Parratt*. Instead, the court of appeals panel in the present case was correct when it stated that under *Parratt* the minimum requirements of procedural due process are met when state law provides the injured party the opportunity for a hearing before a court or other tribunal with the power to grant a remedy. *Daniels*, 720 F.2d at 797.

Petitioner does not dispute that he is entitled under Virginia law to bring a suit against respondent based on simple negligence. If respondent were then to claim an affirmative defense such as sovereign immunity or contributory negligence, petitioner would at the very least receive *the opportunity for a hearing* in the state court on

whether the affirmative defense applied. This opportunity for a hearing appears to be all that is required under the analysis of *Logan v. Zimmerman Brush Co., supra.* As this Court noted in *Logan*, due process does not necessarily entitle "every civil litigant to a hearing on the merits in every case." *Id.* at 437.

The decisions in *Parratt* and *Hudson* acknowledge that a state cause of action may be entirely adequate to satisfy due process even though the state remedy will not provide a plaintiff all of the relief which he might have received if he had been allowed to proceed under § 1983. *Parratt*, 451 U.S. at 543-544; *Hudson*, 468 U.S. at ___, 82 L.Ed.2d at 406.

The more difficult question is to determine when a state remedy, which provides less relief than § 1983 due to a state law affirmative defense, is adequate for the purposes of *Parratt* and the Due Process Clause of the Fourteenth Amendment. Petitioner appears to believe that the question is fully answered by the rather simplistic statement that "no actual compensation" necessarily equals "inadequate remedy." Respondent, on the other hand, contends that the better answer will be found in the decisions by this Court testing the same or similar state law affirmative defenses against the requirements of due process in the context of a state law cause of action.

In the case of *Martinez v. California*, 444 U.S. 277 (1980), this Court considered a claim that a state statute which granted absolute immunity to parole officers violated the Due Process Clause of the Fourteenth Amendment. After considering whether the immunity statute could be viewed as a deprivation of a property interest, this Court held,

> But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting

> the individual citizen from state action that is wholly arbitrary or irrational.

Id. at 282. This Court then determined that in the particular case before them, the immunity statute rationally furthered a reasonable policy and, thus, there was no merit to the appellants' contention that the immunity statute was unconstitutional when applied to defeat appellants' tort claim arising under state law. *Id.* at 283.

Respondent contends that the analysis of *Martinez v. California* regarding when a state law immunity or defense, within the context of the state tort law, violates due process is the correct analysis to be used in determining under *Parratt* whether a state law remedy is adequate and meaningful. If the state law defense or immunity, within the context of the particular case, is "wholly arbitrary or irrational," then the state law remedy will be inadequate for the purposes of *Parratt*. On the other hand, if the state law defense or immunity is not arbitrary or irrational, then the state remedy will be deemed to be adequate and meaningful.

If the analysis of *Martinez* is not applied to the question of whether a state remedy is adequate under *Parratt*, it is probable that many, if not most, cases which *Parratt* and *Hudson* indicate should be heard in state court will still be filed in federal court if the injured parties can find any "blemishes" on the available state remedies. Without the "bright line" analysis of *Martinez*, it will be very difficult for the federal courts to properly discern whether § 1983 should be available to the injured parties. As in the present case, the federal courts would have to construe and forecast the applicability of the intricacies of affirmative defenses such as sovereign immunity.

If petitioner is correct in arguing that the potential sovereign immunity defense in this case necessarily negates the state remedy because petitioner will not receive the same compensation as he would receive under § 1983, it is very difficult to judge where this argument

ceases as it winds its way through the various affirmative defenses and other procedural and substantive impediments which have developed in our system of state laws during the past two centuries. As noted above, if petitioner is correct, the possibility of a contributory negligence defense should also make the state remedy inadequate for purposes of *Parratt*. After all, a plaintiff, who may have suffered injury proximately caused by the defendant's negligence, would receive no compensation in state court if he were found to have contributed to his injury, whereas if the case had been tried in federal court under § 1983, the award of compensation likely would have been different. Arguably, the same rationale would apply to the doctrine of comparative negligence since a plaintiff would not receive full compensation for his injuries if he was partially at fault.[5]

Indeed, if any affirmative defense were to be construed to make the state remedy inadequate if the compensation granted by the state court were less than the compensation which would have been received under § 1983, then there is no end to the potential pitfalls in state court which may be deemed to make the available state remedy inadequate under *Parratt*. Under this analysis, the existence of a shorter statute of limitations in the state action than in a parallel § 1983 action may be sufficient to classify the state remedy as inadequate. Indeed, taken to its logical conclusion, this argument may conclude that if the state rules of pleading and practice were more onerous and less flexible than the Federal Rules of Civil Procedure, then the state remedy might be construed as inadequate.

Respondent contends that the "hair-splitting" endemic to petitioner's argument is not required by the Due Pro-

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[5] *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) where the state court ruled that when both plaintiff and defendant are at fault in causing injury to plaintiff, plaintiff's recovery from defendant will be reduced to the extent that plaintiff's own negligence proximately caused his injury.

cess Clause of the Fourteenth Amendment. If the "bright line" rule of *Martinez v. California* were applied to the question of when a state remedy is adequate, then the federal courts would have a clear guide for determining when cases which fall under the *Parratt* analysis should be dismissed because of the existence of an adequate state remedy.

Respondent further argues that state law affirmative defenses which are not arbitrary or irrational are not inconsistent with the purpose of § 1983 as interpreted by this Court in cases such as *Procunier v. Navarette, supra.* In *Procunier,* this Court recognized that prison officials, under certain circumstances, may claim a qualified "good faith" immunity in § 1983 cases. While respondent is not arguing that the federal qualified immunity is a mirror image of the state sovereign immunity, the results are often the same in that injured plaintiffs are not compensated and public officials are protected from liability for their negligence.

IV. EVEN IF THE SOVEREIGN IMMUNITY DEFENSE IS AVAILABLE IN THE PRESENT CASE, THE DEFENSE IS NOT WHOLLY ARBITRARY OR IRRATIONAL WITHIN THE CONTEXT OF THIS CASE.

In *Martinez*, this Court upheld the absolute immunity of parole officers because the statute rationally furthered a reasonable state policy. 444 U.S. at 283. In the present case, respondent argues that if a state court were to determine that respondent was entitled to sovereign immunity, the application of sovereign immunity in this case would not be wholly arbitrary or irrational.

In two recent cases, the Virginia Supreme Court raised proper reasons for maintaining a limited sovereign immunity. In *Hinchey v. Ogden*, 226 Va. 234, 307 S.E.2d 891 (1983), the Virginia court noted that sovereign immunity tends to protect the state from "burdensome interference with the performance of its governmental functions." *Id.* at 240, 307 S.E.2d at 894. In *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984), the Virginia court noted that sovereign immunity furthers the important state concerns of whether citizens will readily accept public jobs and whether officials will be unafraid to act. *Id.* at 308, 321 S.E.2d at 661.

The concerns raised by the Virginia Supreme Court in defense of some form of limited sovereign immunity are very similar to the concerns raised by this Court in discussing the federal qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which this Court stated that the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" are costs to society as a whole. *Id.* at 814.

It is important to bear in mind that Virginia's sovereign immunity is not absolute in the case of officials such as respondent. If respondent had acted intentionally in injuring petitioner, sovereign immunity would not be

available. *See Elder v. Holland*, 208 Va. 15, 19, 155 S.E. 2d 369, 372-373 (1967) ("a state employee may be held liable for his intentional torts"). As this Court noted in *Hudson*, the holding in *Elder* clearly indicates that public employees "do not enjoy sovereign immunity for their intentional torts." *Hudson*, 468 U.S. at ___, 82 L.Ed. 2d at 409.

In light of the holdings in *Martinez* and *Harlow v. Fitzgerald*, respondent argues that it is clear that the limited form of sovereign immunity which may be claimed by a defendant such as respondent in a Virginia court is not wholly arbitrary or irrational.

V. CONCLUSION

Respondent requests that this Court rule that the personal injury which petitioner, an inmate in the Richmond City Jail, allegedly suffered due to the negligence of respondent, a deputy sheriff, does not rise to the level of a protected liberty interest and, thus, does not state a cause of action under 42 U.S.C. § 1983.

This is a case in which petitioner has a remedy provided by the laws of the Commonwealth of Virginia. Respondent asks this Court to rule that a state cause of action is adequate for purposes of due process if the plaintiff would be provided with an opportunity for a hearing before a tribunal with the power to grant a remedy. Respondent further asks this Court to rule that any affirmative defense, such as sovereign immunity, which may be raised in the state court proceeding does not make the state remedy inadequate unless the affirmative defense, within the context of the case, is wholly arbitrary or irrational. The respondent prays that this Court rule that respondent's potential immunity defense, if available, is not wholly arbitrary or irrational.

Therefore, respondent prays that this Court affirm the judgment of the court of appeals and dismiss this case.

Respectfully submitted,

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No. 84-5872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROY E. DANIELS,

Petitioner,

v.

ANDREW WILLIAMS,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

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SUMMARY OF REPLY

Petitioner brought this case to recover damages which he alleged resulted from Respondent's negligence. Respondent and other officers of the jail in which Petitioner was housed exercised virtually total control over Petitioner as they did over other inmates. But, Respondent maintained below and he continues to maintain before this Court that even if he was negligent, his negligence caused Petitioner severe injuries, and Petitioner could not avoid the injuries because as a prisoner he was subject to Respondent's control, Petitioner has no right to recover damages for his injuries—not in federal court and not in state court.

Respondent cannot, and therefore does not try to, distinguish among situations in which a prisoner is killed, maimed, crippled or injured to a lesser extent. Rather, Respondent claims that the Commonwealth of Virginia has the authority to immunize him from liability for damages in any action in any Virginia state court and that no federal court may hear Petitioner's claim pursuant to 42 U.S.C. § 1983.

The sum and substance of Respondent's argument is that a state may consciously choose to permit its prison and jail officers to act unreasonably and without due care. Respondent asserts that the Due Process Clause of the Fourteenth Amendment does not protect the property of the only citizens who may be kept in involuntary servitude under the Thirteenth Amendment—i.e., prisoners. According to Respondent, states are not obliged by any law to exercise reasonable care to protect the lives and safety of those who are imprisoned and denied freedom to protect themselves.

If Respondent is correct, then the following statement must be true: When the Civil Rights Act was adopted, the

Congress that passed it intended to permit sheriffs, deputy sheriffs and others acting under color of state law to disregard the well established common law rule requiring those persons who had official custody of prisoners to protect those prisoners; the Congress was indifferent to the possibility that the officers who had disregarded the civil rights of Negroes prior to the Civil War would fail to protect persons entrusted to their custody after the War; the Congress intended to provide no federal protection for prisoners against injury or death resulting from the failure of state officers to protect them; and that an officer who acted under color of state law in an unreasonable fashion—e.g., by failing to protect a prisoner from a lynch mob—could not be held responsible in a federal court, even though no state court afforded a remedy for the officer's disregard of duty.

Certainly, this cannot have been the intent of the Congress in 1871. Petitioner argues that Congress intended to assure that state officials would exercise reasonable care in dealing with persons who were deprived of their freedom pursuant to the enforcement of state criminal law. He asks this Court to reaffirm its holdings in *Parratt* v. *Taylor*, 451 U.S. 496 (1981), and in *Hudson* v. *Palmer*, ___ U.S. ___, 104 S.Ct. 3194 (1984), and to indicate that a prisoner who is injured as a result of the negligence of state officers has a right to sue under § 1983 unless the state affords the prisoner a meaningful state court remedy.

Petitioner's argument is consistent with the common law duty owed by officers to prisoners and the background of the 1871 Civil Rights Act, and it recognizes the proper respect federal courts should pay to state law. If Petitioner's argument is accepted, no state need fear untoward federal intrusion into state prisons or a radical

increase in federal lawsuits. The truth, which Respondent never recognizes in its Brief, is as follows: *If Petitioner's argument is accepted, no prisoner will be able to sue state officers in federal court under § 1983 for ordinary torts of any kind—not for negligence, not for recklessness, not even for intentional torts generally—as long as state courts provide meaningful remedies for injuries resulting from official breaches of the duty to protect the lives and safety of prisoners.* Another way of putting the same point is to state that "*if Petitioner's argument prevails, a state and its officers can assure that they need not face § 1983 suits in federal court by policing in their own state courts the breaches of official duty that injure or kill prisoners who are denied the freedom to protect themselves.*

ARGUMENT

I. RESPONDENT HAS PRESENTED NO ARGUMENT FOR TREATING LIBERTY INTERESTS DIFFERENTLY FROM PROPERTY INTERESTS UNDER *PARRATT* V. *TAYLOR*, 451 U.S. 527 (1981), AND *HUDSON* v. *PALMER*, ___ U.S. ___, 105 S.CT. 3194 (1984).

Petitioner argued in his opening brief that there is no basis in the language of § 1983, in its legislative history, in common sense or in reason to treat liberty interests less favorably than property interests in litigation brought under the Civil Rights Act. The decisions of this Court have never indicated that liberty interests and a person's interest in life and safety warrant less protection than does a $23.50 hobby kit. Quite to the contrary, the decisions of this Court have shown a special respect for the person and the integrity of the person. *See, e.g., Wolf* v. *Colorado*, 338 U.S. 25, 27-28 (1949), speaking of the right of personal security; *Mathews* v. *Eldridge*, 424 U.S. 319,

340 (1976), distinguishing *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), on the ground that *Goldberg* involved a denial of the means to live; *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977), finding that there is a right to be free from "unjustified intrusions on personal security."

Respondent does not address these cases nor the background of § 1983. Nor does Respondent point to any decision other than the 5-4 decision by the court of appeals below supporting his argument. Were this Court to accept Respondent's argument, it would be saying that the title of § 1983, "the Civil Rights Act," was wrongly chosen. Respondent would have this Court believe that the Congress that passed § 1983 was concerned not with the freedom, safety and security of newly enfranchised citizens, but with property. Respondent's argument ignores the reading this Court has given to the Civil Rights Act in past cases. It also ignores the language of the Act which fails even to mention property.

The fact is that Respondent cites the Court no authority in support of the decision below other than *Parratt* and *Hudson*, which had no occasion to discuss liberty interests. (Brief for Respondent, at 7-8.) The decisions of this Court, the title and text of § 1983, the legislative history of the statute, the decisions of the other courts of appeals and a decent respect for humanity all say that the court of appeals was wrong. Thus, liberty interests must receive at least the same protections afforded property interests under the Due Process Clause.

For some unexplained reason, Respondent fails to mention this Court's decision in *Wilson* v. *Garcia*, ___ U.S. ___, 105 S.Ct. 1938 (1985).[1] *Wilson* holds that federal

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[1] *Wilson* was decided on April 17, 1985. This was after Petitioner's Brief was filed but well before Respondent's brief was filed.

rather than state law governs the characterization of § 1983 actions for statutes of limitations purposes, and that a § 1983 claim is most appropriately characterized as a personal injury claim. In light of this decision, it is difficult to see how Respondent can argue that liberty interests receive less protection than property interests.

II. NO DISTINCTION SHOULD BE DRAWN BETWEEN INTENTIONAL AND NEGLIGENT ACTS FOR PURPOSES OF SECTION 1983.

Petitioner offered four reasons in his opening brief why the Court should reaffirm its *Parratt* decision that negligent deprivations of a prisoner's protected interests require a remedy. Respondent declines to address any of these reasons except in a perfunctory way. Instead, Respondent cites cases for propositions that they do not support and ignores cases that are more directly in point.

First, Petitioner noted (Brief for Petitioner, at 17) that the Court in *Parratt* had examined the language and the history of § 1983 and had determined that nothing in either suggested that the statute was intended to apply solely to intentional deprivations. *Parratt*, 451 U.S. at 534. Respondent ignores the fact that the Court reached this judgment in a decision that is only four years old and simply asks, without reference to the language or the history of the statute, that the Court ignore the law—i.e., the legislative history, the words in the statute and the language of *Parratt*—in order to declare that something more than negligence is required for a plaintiff to proceed under § 1983. (Brief for Respondent, at 12-15.) This is an invitation to decision by fiat rather than to decision by rule of law.

Second, Petitioner observed (Brief for Petitioner, at 17-18) that any distinction that is drawn between negli-

gence and intentional acts will simply cause plaintiffs to amend pleadings in order to bring a federal suit. For instance, a plaintiff might allege that the defendant's acts were more than simple negligence. If this is sufficient to create a cause of action, the pleading requirement is largely useless.

Respondent asks the Court to hold that mere negligence is not enough. But Respondent does not indicate how much more should be required. What Respondent ignores is thats even in the simplest case, the line between negligence and intentional actions is not easily drawn. The instant case proves this point.

In his affidavit in the district court, (J.A., at 17), Petitioner, a lay person unrepresented by counsel, alleged that he had fallen on a pillow while going down stairs while the pillow was on some newspapers. He alleged that he was told that Respondent had left the pillow on the stairs and that Respondent admitted he had done so but offered no explanation. In the court of appeals, Respondent argued that this allegation "[a]rguably . . . states a cause of action based on something more than mere negligence." (Brief of Andrew Williams in Court of Appeals, at 10.)

The plain truth is that almost all negligence cases involve intentional acts. In this case, for example, the complaint may be read as charging that Respondent intended to leave the pillow on the stairs where Petitioner fell on it. In *Parratt*, prison officials intended to keep the hobby kit from the prisoner. In *Davidson* v. *Cannon*, No. 84-6470, the case scheduled for argument along with the instant case, the prison officials intended to offer no additional protection to Davidson despite their knowledge of a threat made to Davidson. In these and in many cases, the plaintiffs allege that the defendants intended to take cer-

tain actions or to refrain from taking actions. Typically, the plaintiff alleges that the decision to act or not to act was negligent or was a breach of a duty established by law which is the equivalent of negligence.

A holding that would restrict § 1983 to complaints alleging something more than mere negligence would require this Court to address even more complicated issues than it has yet had to face under the statute. Is an intentional act plus negligence sufficient to create a cause of action? Is clear negligence sufficient? Would recklessness be sufficient? What about gross negligence?

Deans Prosser and Keeton have observed that "intent" is one of the most often misunderstood legal concepts.[2] They note that the intent which governs most tort law "is not necessarily a hostile intent, or a desire to do any harm."[3] In fact a defendant may be liable for actions taken while "honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good."[4] After two hundred years of tort litigation and the development of a myriad of subtle differences between intent and malice, knowledge and intent, and intent and motive, this Court would undertake to write a new code of tort principles for federal courts were it to accept Respondent's argument and hold that allegations of negligence are insufficient to state a claim under § 1983.

Even worse, the Court would have to compare its definition of these concepts with those used by various states. It is possible, for example, that the Court could rule that

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[2] W. Prosser & W. Keeton, Prosser and Keeton On The Law Of Torts § 8, at 33 (5th ed. 1984).

[3] *Id.* at 36.

[4] *Id.* at 36-37 (footnotes omitted).

recklessness or intentional injury is sufficient to support a claim under § 1983, while a state like Virginia might require a greater showing of fault to deprive an officer of sovereign immunity.[5] Or, a state might use language similar to that chosen by the Court but give it different meaning. To decide whether a prisoner has a meaningful remedy in state court, a federal court would have to parse the intricacies of state tort law.

The fact is that Respondent cannot even suggest to the Court exactly how much more than negligence must be shown by a prisoner who sues under § 1983. (Brief for Respondent, at 14.) At one point, Respondent speaks in terms of intentional conduct, gross negligence, or reckless indifference." *Id.* But, later he implicitly asks the Court to overrule *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), and to hold that a plaintiff must prove willful or recklessly indifferent behavior. (Brief for Respondent, at 18).[6] It is apparent that Respondent has no idea whether willfulness is the same as gross negligence or is different.

Deans Prosser and Keeton observe that the concept of degrees of negligence "has been condemned by most writers, and, except in bailment cases, rejected at common law by most courts, as a distinction 'vague and impractica-

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[5] This is not an unlikely scenario. The Virginia Supreme Court has stated in dictum that a defendant who acts "wantonly, or in a culpable or grossly negligent manner" is not protected by sovereign immunity. *James* v. *Jane*, 221 Va. 43, 53, 267 S.E.2d 108 (1980). Whether a Virginia court would equate recklessness and gross negligence is uncertain. Whether any state court would attribute the same meaning to various terms that this Court would is also unclear.

[6] Respondent does not indicate to the Court that it would have to overrule a part of this case, but it is clear that the Court would have to do so, because *Monroe* v. *Pape*, 365 U.S. 180, 187 (1961), rejects a willfulness requirement.

ble in [its] nature, so unfounded in principle,' that it adds only difficulty and confusion to the already nebulous and uncertain standards which must be given to the jury."[7] They go on to demonstrate that it is hardly clear even now what terms like willful, wanton, reckless or gross negligence mean. For this Court to accept Respondent's argument, it must be prepared to devote substantial time and energy to monitor the subtleties of tort principles that have left the finest scholars puzzled.[8]

The effort to draw a line separating negligence from intentional torts is not worth the candle. More importantly, it is inconsistent with the purpose of § 1983.

Section 1983 was enacted, along with the Fourteenth Amendment and other civil rights provisions, to assure that the basic liberties of all citizens would be protected.

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[7] Prosser & Keeton, *supra* note 2, § 34, at 210, quoting Heuston, Salmond on Torts, 16th ed. 1973, § 80, at 224 n.69 (footnotes omitted). This Court has first-hand experience with the slippery concepts of malice, gross negligence and recklessness. *See Smith* v. *Wade*, 461 U.S. 30 (1983).

[8] The Court would also be faced with enormous problems of determining when a litigant should be collaterally estopped from pursuing a § 1983 claim. Suppose, for example, that a state provided sovereign immunity for all torts except intentional and willful ones, and that aggravated negligence or a high degree of negligence was insufficient to deprive an officer of immunity; and that this Court held that gross negligence or recklessness was sufficient to warrant a § 1983 action. If a prisoner first sued in state court and lost, a federal court hearing his next suit, brought in federal court under § 1983, would have to decide whether the prisoner lost because the jury believed there was no fault or because the jury believed there was no willfulness. If the jury believed the latter, the prisoner would have a valid § 1983 suit. But, if the state court uses a general verdict, how could the federal court realistically know whether or not to hold that the prisoner is estopped?

Surely the Congress that enacted the statute to protect all people from wrongful deprivations of their liberty, which had been aided and abetted by sheriffs failing to offer protection, were not concerned with whether rights were denied intentionally or indifferently. The goal of the statute was to force officers acting under color of law to conform to the requirements of law.

The Court recognized this in *Monroe* v. *Pape*, 365 U.S. 167, 180 (1961), as it quoted Senator Thurman's speech concerning § 1983, wherein he observed that under the statute, "[t]he deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they might be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts . . . ."[9] The Court went on to reject any requirement that an act must be willful to fall within § 1983, as it stated that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequence of his actions." *Id.* at 187.

Third, Petitioner pointed out (Brief for Petitioner, at 18-19) that in some situations negligence claims plainly fall within § 1983, thus establishing beyond any reasonable doubt that the statute is not intended to distinguish between negligent and intentional torts. In *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978), for example, the Court held that defendants were entitled to judgment as a matter of law because they had not acted unreasonably.

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[9] The Senator proved to be quite prescient. *See, e.g., Carey* v. *Piphus*, 435 U.S. 247 (1978) (approving awards of nominal damages).

Procunier is simply one of many "qualified immunity" decisions rendered by this Court. *See also*, *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). This Court made it clear in *Wood* v. *Strickland*, 420 U.S. at 322, that liability will be imposed under § 1983 when an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected." If the word "student" is changed to "person," the standard is the one applied in all qualified immunity cases. This standard holds an official liable for negligent acts as well as more deliberate ones. Respondent would have the Court for the first time create an immunity for all negligence—i.e., for every official who knew or reasonably should have known that he was breaching a duty. Such an immunity would remove much of the protection afforded by the statute. Yet, Respondent fails even to address these cases in arguing that negligence is insufficient to support a § 1983 action.

Finally, Petitioner argued (Brief for Petitioner, at 19) that as long as a state provides basic protections for prisoners and opens its courts to garden variety tort cases, federal suits will be unnecessary. Respondent ignores this argument and complains about the federal intrusion into state affairs (Brief for Respondent, at 18) without once recognizing that a meaningful state court remedy will move cases like the instant one into state courts where Petitioner indicated he would have sued but for the sovereign immunity doctrine.[10]

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[10] Judge Winter's concurring opinion in two companion cases that were argued together with Petitioner's in the court of appeals states

Rather than face any of the arguments made by Petitioner or to address the relevant decisions of this Court, Respondent cites *Paul* v. *Davis*, 424 U.S. 693 (1976); *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Procunier* v. *Navarette*, 434 U.S. 555 (1978); and *Baker* v. *McCollan*, 443 U.S. 137 (1979), all of which are examined in Petitioner's brief and none of which is relevant to the arguments that Respondent makes to this Court.

In *Paul*, the Court found that a person had no protected interest in his reputation. It did not address the question whether, *if there had been a protected interest in reputation*, a negligent injury to that reputation might under some circumstances be actionable under § 1983. In *Estelle*, the Court held that under some circumstances a deliberate denial of medical treatment or reckless disregard of a prisoner's medical needs might be cruel and unusual punishment actionable under § 1983 *notwith-*

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that Petitioner had filed suit in state court before bringing this § 1983 action. (J.A. at 51 n.1.) Petitioner cited this statement in the Petition for Certiorari. Judge Phillips' opinion, dissenting and concurring in part, in the instant case (J.A., at 43 n.4.), makes a similar reference to a parallel state action. The statement is not quite accurate. The confusion among the judges is easily explained. During oral argument, Petitioner represented to the court of appeals that he would have sued and would still sue in state court but for the sovereign immunity doctrine. The en banc court of appeals specifically asked Respondent's counsel whether Respondent would waive the immunity defense *if Petitioner sued in state court*, and counsel stated categorically that the defense would not be waived. Thus, the judges were referring to a contemplated suit, not one actually brought. Petitioner requested that the court of appeals supply a copy of the en banc oral argument to this Court, but learned that the argument tapes had been erased. There is no doubt, however, that Respondent was invited by the en banc court to waive the defense and declined to do so.

standing whether a state remedy existed. The Court noted that state courts provided remedies for ordinary negligence in providing medical treatment.[11] As noted above, *Procunier* is a qualified immunity case. Contrary to the intimations by Respondent, the Court plainly indicated that there would be liability where defendants failed to conform their conduct to established legal standards. *Baker* did not involve a breach of duty at all. Police exercised reasonable care even though they arrested the wrong person. They held this person pursuant to a valid warrant. This Court did not say there would be no liability under § 1983 for a negligent arrest or a detention without probable cause.

Petitioner submits that Respondent has been unable to muster legal authority or persuasive reasoning to support a distinction between negligence and other types of fault-based torts for purposes of § 1983.[12] Moreover, Respondent has offered no evidence that the Congress which enacted the 1871 statute intended to require more than an allegation of fault, such as negligence, to support a claim by a state prisoner injured by his custodians. Recent scholarship indicates that Congress specifically intended to preserve common law duties that were owed by state

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[11] Apparently, Respondent argues to the Court that if a prisoner is compelled to obtain his medical treatment from a prison doctor, the state may create an immunity doctrine that could bar the prisoner from recovering for medical malpractice in state or federal court, even though this negligence may result in death or permanent serious injury. The Court has never confronted such a claim in its past cases.

[12] Although few cases arose under § 1983 before 1960, there is authority predating the recent cases which plainly holds that § 1983 does not require proof of willfulness, maliciousness or intentional acts. *See, e.g., Brickhouse* v. *Brooks*, 165 Fed. 534 (C.C.E.D.Va. 1908).

officers.[13] Thus, it appears that Congress specifically intended that prisoners be protected by § 1983 from injuries due to the fault of state officers.

Even if the Court could find some indication that Congress wished to require something more than negligence as a prerequisite to an action under § 1983, that *something more* exists in suits brought by prisoners. The fact is that sheriffs and other officials who have custody over prisoners owe a special duty to care for those in their custody. Thus, in the instant case, Petitioner has alleged both negligence *and in addition* the breach of this special duty. In fact, this kind of breach is the original example of aggravated or unusual negligence.[14] This Court recognized a similar duty of care owed to passengers by common carriers in *Pennsylvania Co.* v. *Roy*, 102 U.S. 451, 455-56 (1880) (and cases cited therein). Accordingly, the instant case is properly brought under § 1983 even if something more than negligence must be shown.

III. RESPONDENT OFFERS NO AUTHORITIES SUGGESTING THAT OFFICERS WHO HAVE TOTAL CONTROL OVER A PRISONER OWE THAT PRISONER NO DUTY OF CARE.

Petitioner cited in his opening brief this Court's decision in *South* v. *Maryland*, 59 U.S. 396 (1856), which plainly recognized that a sheriff is liable for acts of misfeasance or non-feasance causing injury to a party in the sheriff's custody. The special duty of care was recognized in England as well as in the United States. Petitioner argues that when Congress legalized one form of involun-

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[13] *See* Kreimer, The Source of Law in Civil Rights Actions: Some Old Light on Section 1988, 133 U. Pa. L. Rev. 601 (1985).

[14] *See* Prosser & Keeton, *supra* note 2, § 34, at 208-09.

tary servitude, imprisonment pursuant to a conviction, in the Thirteenth Amendment it surely would not have wanted to relax the duty of care owed by sheriffs and other custodial officers. The laxness of these officers was partly responsible for the unequal treatment of persons prior to the Civil War. It is inconceivable that Congress would have become indifferent to the negligence of sheriffs and other custodial officials after the War.

This Court stated in *Ingraham* v. *Wright*, 430 U.S. at 672-73, that "[t]he Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection they had enjoyed as Englishmen against the power of the Crown." *South* v. *Maryland* recognized that one such protection was the right to recover against a sheriff for breach of his ministerial duties, a right that had been established for centuries. 59 U.S. at 402-03. That right became part of the Due Process Clause of the Fourteenth Amendment.[15]

Respondent offers no answer to this argument, except to say that the Court should ignore the history and treat prisoners as if they were no differently situated from free citizens. (Brief for Respondent, at 15-16.) But, prisoners are differently situated.

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[15] After deciding the instant case, the court of appeals decided *Jensen* v. *Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985), and recognized that a right to affirmative protection arises from a custodial relationship. It cited *Fox* v. *Curtis*, 712 F.2d 84 (4th Cir. 1983). After deciding *Davidson* v. *Cannon*, No. 84-6470, which is being argued together with the instant case, the Third Circuit also recognized that a custodial relationship imposes a special duty of care upon officers. *Estate of Bailey* v. *County of York*, 768 F.2d 503 (3d Cir. 1985).

> [T]he most striking aspect of prison, in terms of Fourteenth Amendment litigation, is that prison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others.

Morales v. *Schmidt*, 340 F.Supp. 544, 550 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973), *remanded on reh'g en banc*, 494 F.2d 85 (1974).

IV. RESPONDENT MAKES NO ARGUMENT THAT IT IS REASONABLY LIKELY THAT PETITIONER COULD AVOID A SOVEREIGN IMMUNITY DEFENSE IN STATE COURT, BUT ARGUES THAT PETITIONER NEVERTHELESS HAD A MEANINGFUL STATE COURT REMEDY.

Respondent asks this Court to hold that under *Parratt* and *Hudson* a state court remedy is adequate if two criteria are satisfied: 1) "state law provides the injured party with the opportunity for a hearing before a court or other tribunal with the power to grant a remedy," and 2) defenses or limitations upon suits are not "arbitrary and irrational." (Brief for Respondent, at 3-4, 29-30.)

Were Respondent's argument to be accepted, any state could assure that no one ever could hold any of its officers liable under § 1983 for torts upon prisoners. Respondent's argument would permit a state to protect all of its officers against suits for any form of tortious behavior—i.e., negligence, recklessness, intentional torts, even murder—simply by expanding the doctrine of sovereign immunity. Respondent supports the Virginia Supreme Court's broadening of sovereign immunity in recent years to cover

almost all state officers. (Brief for Respondent, at 26.) Respondent states that it is rational for a state to broaden immunity in order to protect officers from the burdens of suits and to encourage people to take public jobs. *Id.* But, if these rationales mean that officers can effectively be immunized from liability, no prisoner would have a right to protection at all. As noted above, § 1983 was intended to carry forward the protection that prisoners were entitled to receive from their jailers.

Respondent would have this Court hold that there is a meaningful remedy if a state permits a prisoner to file a suit but establishes a rule of law that bars the prisoner from holding officers liable for the tortious harm that they have inflicted upon the prisoner. In other words, Respondent asks this Court to hold that the *Parratt* concept of a meaningful remedy does not require that an injured party have any real chance for relief in a state court; it is enough that a suit can be filed which by law must be dismissed.

It is this overbroad notion of sovereign immunity that Petitioner claims negates the very concept of a meaningful remedy. Petitioner's argument is straightforward: an officer like Respondent must be accountable for the injuries suffered by a prisoner as a result of the officer's negligence while the prisoner is entrusted to his care.[16]

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[16] Petitioner has never argued that the scope of the state remedy must be identical to the scope of a federal remedy. He has claimed only that a state owes a duty to those whom it imprisons to protect them and to provide a meaningful, adequate remedy for breaches of that duty. The precise contours of the remedy may well differ among the states. The problem with sovereign immunity of the sort established by the Commonwealth of Virginia and relied upon by Respondent is not that it is different from federal immunity, but that it entirely negates the duty and the remedy to which a prisoner is entitled.

The original panel opinion of the court of appeals reasoned that sovereign immunity was like a statute of limitations defense—i.e., the existence of a defense does not negate the remedy. (J.A. at 30.) But the en banc court recognized the error of this reasoning and did not follow it. The reasoning fails because a statute of limitations gives a plaintiff a fair chance to vindicate his claim; all that he must do is avoid tardiness. Sovereign immunity negates the claim and abolishes liability.

Once this is understood, it is perfectly clear that Respondent's lame effort to argue that if an overbroad sovereign immunity doctrine means that a state's protection of prisoners is not meaningful, a state's rule on contributory negligence or comparative negligence might also cause problems. This plainly is not a serious argument, since there is no comparison between contributory negligence and sovereign immunity. Contributory negligence denies a plaintiff recovery because of his own wrongdoing, not because the law makes an official immune. A prisoner has no right to be negligent, and Petitioner has never claimed any such right. His claim is, and has been, that a state may not deny a prisoner a remedy against a negligent officer who has tortiously injured the prisoner when the prisoner was faultless. After months and months to prepare a brief, Respondent has been unable to suggest a single other defense which would be suspect under the "meaningful remedy" analysis should Petitioner prevail.[17]

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[17] At one point, Respondent posits that a state statute of limitations might be different from the statute governing § 1983 cases. This suggestion is untenable, however, in light of this Court's decision in *Wilson* v. *Garcia*, ____ U.S. ____, 105 S.Ct. 1938 (1985). *See* note 1 *supra*.

It now appears that Respondent is arguing that sovereign immunity indeed would bar Petitioner's suit, but that the doctrine is not wholly arbitrary or irrational.[18] That doctrine, however, denies Petitioner a remedy for negligence no matter how strong his proof and how great his injury. For this reason, the Virginia sovereign immunity doctrine denies Petitioner and similarly situated prisoners a meaningful remedy.

CONCLUSION

Petitioner does not ask this Court to open the doors of federal courts to negligence claims without reservation. Rather, Petitioner asks that this Court hold the Commonwealth of Virginia and its officers accountable in the same way that sovereigns and their officers have been accountable for hundreds of years for taking due care to protect the lives and safety of prisoners under their exclusive control. If the state courts of Virginia were open to suits for negligence and the doctrine of sovereign immunity were

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[18] When this case was argued with the two companion cases, the court of appeals questioned counsel in each case about common issues in all cases. The court ordered that the rehearing proceed on the original briefs. The Virginia Attorney General, who appeared on the brief in the companion cases, technically was not on the brief in the instant case. The arguments made in the brief for the defendants in the companion cases, as well as the oral argument by an Assistant Attorney General, were virtually identical to and supported the arguments made in the instant case. The court of appeals listed the Attorney General and his assistant as counsel when it issued its opinion in the instant case. This caused Petitioner to state at pages 3 and 29 that the Attorney General had joined Respondent's brief. A more precise statement is that the Attorney General's arguments in the consolidated cases below were the same as and supportive of Respondent's.

properly narrowed, Petitioner and others like him would litigate their cases in state court.

It is Respondent, not Petitioner, who asks this Court for too much. He wants to claim sovereign immunity as an absolute bar to a state court recovery and have the federal courts decline to hear Petitioner's complaint. Respondent casts his argument in the language of federalism, but its true nature is unmistakable. The fact is that Respondent wants to avoid liability for his negligence. Were this not so, he would have waived sovereign immunity, and this suit would have proceeded in state court. To close the doors of the federal courts when a state makes its officers unreachable for their torts is to turn back the clock, to drain § 1983 of its protection for those most vulnerable, and to leave person, life and property unprotected for those unable to protect themselves. Section 1983 would no longer be a Civil Rights Act; it would be a statute protecting civil wrongs.

Respectfully submitted,

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